Michael J. Meehan, Arizona Bar No. 2892
LAW OFFICE OF MICHAEL MEEHAN
3938 E. Grant Rd. No. 423
Tucson, Arizona 85712
Telephone: (520) 529-1969
mmeehan.az@msn.com

FEDERAL PUBLIC DEFENDER
Capital Habeas Unit
850 W. Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone: (602) 382-2816
Facsimile: (602) 889-3960
Dale A. Baich, Ohio Bar No. 0025070
Robin C. Konrad, Alabama Bar No. 2194-N76K

Attorneys for Petitioner
Daniel Wayne Cook

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DANIEL WAYNE COOK, Petitioner, v. CHARLES RYAN, Director of Arizona Department of Corrections, Arizona State Prison – Florence Complex, Respondent.	No. 97-cv-146-PHX-RCB **Notice of Appeal**

Notice is hereby given that DANIEL WAYNE COOK, Petitioner in the above-named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Court's Order of July 6, 2012, Doc. 122.

RESPECTFULLY SUBMITTED this 11th day of July, 2012.

LAW OFFICE OF MICHAEL MEEHAN
3939 E. Grant Rd. No. 423
Tucson, Arizona 85712

FEDERAL PUBLIC DEFENDER
Capital Habeas Unit
850 W. Adams Street, Suite 201
Phoenix, Arizona 85007

By /s/
Michael J. Meehan

Attorneys for Petitioner
Daniel Wayne Cook

COPY of the foregoing mailed this
11th day of July, 2012 to:

Kent Cattani
Chief Counsel
Criminal Appeals/Capital Litigation Section
1275 W. Washington
Phoenix, AZ 85007-2997

/s/Michael J. Meehan_____

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Daniel Wayne Cook, Petitioner, v. Charles L. Ryan, et al., Respondents.	No. CV-97-00146-PHX-RCB DEATH PENALTY CASE **ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**

Before the Court is Petitioner's motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Doc. 118.) The motion is based on the Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that ineffectiveness of post-conviction counsel may serve to excuse the procedural default of claims alleging trial counsel ineffectiveness. Petitioner argues that *Martinez* provides a proper ground for this Court to reopen his federal habeas proceeding and to find cause for the procedural default of a claim alleging a Sixth Amendment violation based on counsel's failure to undertake a timely mitigation investigation. Respondents oppose the motion. (Doc. 119.) As explained herein, the Court concludes that Petitioner has failed to establish extraordinary circumstances to justify reopening this case. Even if the Court reconsidered its procedural bar determination, Petitioner has not demonstrated cause under *Martinez* to excuse the default.

BACKGROUND

In 1988, a jury convicted Petitioner of two counts of first-degree murder for the brutal killing of two acquaintances in Lake Havasu City. Details of the crimes are set forth in the Arizona Supreme Court's opinion upholding Petitioner's convictions and sentences. *See State v. Cook*, 170 Ariz. 40, 45-46, 821 P.2d 731, 736-37 (1991) ("*Cook I*").

Prior to trial, Petitioner chose to waive his right to counsel. After strongly advising Petitioner against self-representation, the trial court accepted Petitioner's waiver as knowing, intelligent, and voluntary. Following conviction, Petitioner continued to represent himself and presented no mitigating evidence at the sentencing hearing, stating that the "[o]nly sentence I will accept from this Court at this time is the penalty of death, your Honor. I have nothing further." *Cook v. Schriro*, 538 F.3d 1000, 1011 (9th Cir. 2008) ("*Cook II*"). After reviewing the presentence report, pre-trial mental health evaluations, the State's sentencing memorandum, a letter from Cook, the trial evidence, and matters from hearings in the case, the trial court found several aggravating factors and no mitigating factors sufficient to outweigh the aggravation, and sentenced Petitioner to death.

On appeal, Petitioner argued that the trial court erred by allowing him to waive appointed counsel. In rejecting this claim, the Arizona Supreme Court observed that "[w]hile Cook certainly lacked a lawyer's skills, the record demonstrates that he was intellectually competent, understood the trial process, and was capable of making—and did make—rational decisions in managing his case." *Cook I*, 170 Ariz. at 48, 821 P.2d at 739.

Petitioner also sought post-conviction relief ("PCR") under Rule 32 of the Arizona Rules of Criminal Procedure. Among other claims in the PCR petition, Petitioner asserted that pre-trial counsel had been ineffective in failing to investigate and to prepare for trial and sentencing and that this deficient representation impermissibly forced Petitioner to choose self-representation. Following an evidentiary hearing, the trial court denied PCR relief. The court first found no prejudice from any alleged deficiencies by pre-trial counsel because the court could only speculate as to what could have happened had counsel represented Petitioner at trial. The court also found that Petitioner had failed to identify any specific

action that was ineffective and that no caselaw required a judge to inquire about the effectiveness of appointed counsel in determining whether a waiver of counsel is knowing, intelligent, and voluntary. Petitioner sought rehearing of the waiver issue but not the separate claim alleging ineffectiveness by pre-trial counsel. Following denial of rehearing, the Arizona Supreme Court summarily denied a petition for review.

In January 1997, Petitioner initiated federal habeas corpus proceedings. Among other claims, Petitioner asserted in his habeas petition that his decision to waive counsel was not knowing, voluntary, and informed because he was forced to choose between ineffective counsel and self-representation. He also asserted as a stand-alone claim that pre-trial counsel's representation was constitutionally deficient. In September 1999, this Court determined that the ineffectiveness claim was procedurally defaulted because Petitioner had failed to include it in his motion for rehearing from the denial of state PCR relief and had not established cause to excuse the default. (Doc. 39 at 14-15.) In March 2006, the Court denied relief on the remainder of Petitioner's claims. With regard to the waiver issue, the Court determined that no clearly established federal law required the trial court to inquire into Petitioner's potential dissatisfaction with counsel prior to allowing him to waive counsel. (Doc. 90 at 12-15.)

On appeal, the Ninth Circuit affirmed. In a section titled "Ineffective assistance of pre-trial counsel," the court concluded that the state court's factual determinations concerning pre-trial counsel's representation were supported by the record and that its rulings on Petitioner's ineffectiveness claims were not objectively unreasonable. *Cook II*, 538 F.3d at 1016. The court also determined that the Supreme Court "has never held that a defendant who does not inform the court that he wants to represent himself because he believes that his counsel is ineffective was coerced into representing himself." *Id.* Regarding Petitioner's allegation that pre-trial counsel was ineffective for failing to investigate mitigating evidence, the court agreed with this Court that the claim was procedurally barred because under the version of Arizona Rule of Criminal Procedure 32.9 applicable to Petitioner's case the failure to detail each ground of relief in a motion for rehearing waived further review of that issue.

Id. at 1026-27. Furthermore, the court found that counsel ineffectiveness did not constitute cause for the procedural default because Petitioner had no right to counsel in state court at the motion for rehearing stage. *Id.* at 1027, *citing State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) ("After counsel or the pro per defendant submits the post-conviction petition to the court and the trial court makes its required review and disposition, counsel's obligations are at an end.").

In January 2009, the Supreme Court denied a petition for certiorari, effectively ending these federal habeas corpus proceedings, and the Arizona Attorney General sought a warrant of execution. At the time, litigation concerning the constitutionality of Arizona's lethal-injection protocol was pending in both state and federal courts, and the Arizona Supreme Court declined to issue a warrant. Instead, the court directed Petitioner to initiate a new state PCR proceeding to litigate the constitutionality of Arizona's lethal-injection protocol, and Petitioner promptly filed a second PCR petition. The petition challenged the execution protocol but also asserted among other claims that pre-trial counsel had been ineffective for failing to conduct a mitigation investigation. The trial court denied relief in December 2009, finding in part that Petitioner's ineffectiveness claims had been previously litigated and therefore were precluded. The Arizona Supreme Court denied a petition for review in September 2010, and the State again sought a warrant of execution.

In November 2010, while the warrant request was pending, Petitioner filed a third PCR petition seeking relief on the grounds of newly-discovered material facts that probably would have changed his sentence and the existence of facts establishing that the trial court would not have imposed the death penalty. *See* Ariz. R. Crim. 32.1(e) and (h) (providing exceptions to preclusion for successive petitions raising claims based on newly-discovered evidence and actual innocence). Specifically, Petitioner asserted that he only recently was diagnosed as suffering from post-traumatic stress disorder ("PTSD") and organic brain dysfunction and that this mitigation probably would have resulted in a non-death sentence. On January 27, 2011, the trial court denied relief, stating "unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time

of the murders it still would have imposed the death penalty." The court further noted that the subsequent PTSD diagnosis "simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court." Finally, the court observed that Petitioner had failed to diligently develop his PTSD evidence.

On February 8, 2011, the Arizona Supreme Court issued a warrant of execution for April 5, 2011. On March 8, 2011, Petitioner sought review in the state supreme court of the trial court's denial of the third PCR petition. He argued *inter alia* that his alleged lack of diligence in developing the PTSD diagnosis was due to the ineffective assistance of counsel during his first PCR proceeding and asserted that he had the right to effective post-conviction counsel under the Sixth Amendment. The Arizona Supreme Court summarily denied review on March 22, 2011.

Petitioner then filed a petition for certiorari and asked the Supreme Court to stay his execution pending resolution of certiorari in *Martinez v. Ryan*, a case that presented the question of whether the Sixth Amendment requires the effective assistance of post-conviction counsel when a post-conviction proceeding is the first opportunity to raise trial ineffectiveness claims. On April 4, 2011, the Supreme Court granted the motion for stay pending disposition of Petitioner's certiorari petition. *See Cook v. Arizona*, 131 S. Ct. 1847 (2011).

On March 20, 2012, the Court in *Martinez v. Ryan* declined to reach the constitutional question on which certiorari had been granted. 132 S. Ct. at 1315. Instead, the Court adopted an equitable rule, finding that in order to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* [*v. Thompson*, 501 U.S. 722 (1991),] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id.* The Court held that in states like Arizona, which require ineffective assistance of trial counsel claims to be raised in an initial-review collateral

proceeding, failure of counsel in an initial-review collateral proceeding to raise a substantial trial ineffectiveness claim may provide cause to excuse the procedural default of such a claim. *Id.*

Less than a week after issuing the *Martinez* opinion, the Court denied Petitioner's certiorari petition, *Cook v. Arizona*, 132 S. Ct. 1790 (2012), and the State sought issuance of a new warrant of execution. Petitioner then requested leave to file an untimely petition for rehearing from the denial of certiorari in these federal habeas proceedings. The motion urged rehearing in light of *Martinez* and requested that Petitioner's federal habeas case be remanded back to the Ninth Circuit for a determination of whether ineffectiveness by post-conviction counsel constitutes cause for the procedural default of his trial ineffectiveness claims. The Court denied the request on May 29, 2012. *Cook v. Schriro*, No. 08-7229, 2012 WL 1912258 (U.S. May 29, 2012).

On June 5, 2012, Petitioner filed the instant motion, arguing that extraordinary circumstances based on *Martinez* justify reopening this Court's prior judgment and that post-conviction counsel's ineffectiveness constitutes cause to excuse the default of his claim alleging pre-trial counsel ineffectiveness. On the same day, Petitioner filed a second petition for writ of habeas corpus raising anew a claim of ineffective assistance of pre-trial counsel.[1]

On June 12, 2012, the Arizona Supreme Court issued a warrant of execution for August 8, 2012. Subsequently, Petitioner filed a motion for stay of execution pending disposition of his Rule 60(b) motion and/or new habeas petition.

DISCUSSION

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and

[1] The Court addresses Petitioner's newly-filed petition in a separate order, concluding that it constitutes a prohibited second or successive petition under the dictates of 28 U.S.C. § 2244(b) and therefore must be dismissed.

requires a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

I. Second or Successive Petition

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions. In *Gonzalez*, the Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim *on the merits*." *Id.* at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at n.4. The Court further explained that a Rule 60(b) motion does *not* constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.*

Respondents argue that the instant motion constitutes a prohibited second or successive habeas petition because Petitioner's claims of trial ineffectiveness were rejected on the merits "in the context of" Petitioner's claim that counsel ineffectiveness led to Petitioner's decision to represent himself. (Doc. 119 at 6.) In response, Petitioner asserts that Respondents misapprehend his argument and that the already-resolved claim of ineffectiveness-induced waiver of trial counsel is separate from the claim that counsel was ineffective for failing to investigate and develop a mitigation plan. (Doc. 120 at 2.)

In its order analyzing Petitioner's waiver-of-counsel claim, this Court did not address the merits of Petitioner's allegations of ineffectiveness by trial counsel, having previously found them to be procedurally barred. However, on appeal, prior to addressing the waiver issue, the Ninth Circuit found that "the trial court's rulings on Cook's ineffective assistance of counsel claims were not contrary to or unreasonable applications of *Strickland*." *Cook II*, 538 F.3d at 1016. Although it appears the appellate court may have reached the merits of Petitioner's ineffectiveness claims, a closer reading of the opinion persuades this Court that Petitioner's Rule 60(b) motion does not constitute an unauthorized successive petition.

First, the Ninth Circuit addressed ineffectiveness only with respect to several trial-related issues, finding no merit to Petitioner's claimed prejudice from the lost opportunity to have a stronger presentation on reasonable doubt, to impeach the co-defendant, and to challenge the co-defendant's plea agreement. *Id.* Further, in the context of analyzing Petitioner's waiver claim, the appellate court did not discuss counsel's alleged failure to investigate mitigating evidence. Rather, the court expressly affirmed this Court's finding of procedural default as to the mitigation-related ineffectiveness claim. *Id.* at 1024-26. Because neither the Ninth Circuit nor this Court expressly addressed the merits of Petitioner's sentencing ineffectiveness claim, and both courts clearly found the claim procedurally barred, this Court has jurisdiction under *Gonzalez* to consider Petitioner's Rule 60(b) motion, free of the constraints imposed by 28 U.S.C. § 2244(b) upon successive petitions.[2] *See Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007) (finding § 2244(b) inapplicable where Rule 60(b) motion sought to reopen judgment on procedurally barred claim).

II. Extraordinary Circumstances

The Court turns now to the issue raised in the instant motion—whether in this case *Martinez* constitutes extraordinary circumstances justifying relief under Rule 60(b)(6) to reconsider the Court's procedural bar ruling. When a petitioner seeks post-judgment relief based on an intervening change in the law, the Ninth Circuit has directed district courts to balance numerous factors on a case-by-case basis. *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009); *see also Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012). These include but are not limited to: (1) whether "the intervening change in the law . . . overruled an otherwise settled legal precedent;" (2) whether the petitioner was diligent in pursuing the

---

[2] Although not raised by Respondents in their opposition, the Court observes that Petitioner's motion possibly could be construed as an impermissible second or successive petition because the sentencing ineffectiveness claim Petitioner ultimately seeks to litigate if the Court were to find cause under *Martinez* is fundamentally different from the defaulted sentencing ineffectiveness claim raised in the amended federal habeas petition. Because Respondents have not made this assertion and the motion fails on other grounds, the Court does not address the issue here.

issue; (3) whether "the final judgment being challenged has caused one or more of the parties to change his position in reliance on that judgment;" (4) whether there is "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief;" (5) whether there is a "close connection" between the original and intervening decisions at issue in the Rule 60(b) motion; and (6) whether relief from judgment would upset the "delicate principles of comity governing the interaction between coordinate sovereign judicial systems." *Phelps*, 569 F.3d at 1135-40. After consideration of these factors, the Court determines that the balance weighs against granting post-judgment relief.

Change in the Law

The first factor considers the nature of the intervening change in the law. In *Lopez*, another capital case from Arizona in which the petitioner sought relief under Rule 60(b) based on *Martinez*, the court found that the Supreme Court's creation of a narrow exception to otherwise settled law in *Coleman* "weigh[ed] slightly in favor of reopening" the petitioner's habeas case. 678 F.3d at 1136. "Unlike the 'hardly extraordinary' development of the Supreme Court resolving an existing circuit split, *Gonzalez*, 545 U.S. at 536, the Supreme Court's development in *Martinez* constitutes a remarkable—if 'limited,' *Martinez*, 132 S. Ct. at 1319—development in the Court's equitable jurisprudence." *Id.* Thus, based on *Lopez*, this factor weighs slightly in Petitioner's favor. *But see Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012) (finding that *Martinez* is "simply a change in decisional law" and does not constitute an extraordinary circumstance justifying postconviction relief).

Diligence

The second factor, whether Petitioner was diligent in pursuing the issue, also weighs in Petitioner's favor. This is not a case, such as *Lopez*, where the petitioner not only failed to advance post-conviction counsel's ineffectiveness as cause for the default of his sentencing ineffectiveness claim, but argued that such counsel had in fact been diligent in developing the claim. 678 F.3d at 1137. Here, Petitioner argued to the Ninth Circuit that ineffective assistance of post-conviction counsel constituted cause because the post-conviction proceeding was the first opportunity he had to raise trial ineffectiveness claims

and thus he was not subject to the preclusive rule of *Coleman*. Appellant's Supplemental Reply Brief, *Cook v. Schriro*, No. 06-99005, 2007 WL 4733563, at *18 (9th Cir. Nov. 27, 2007). In rejecting the claim, the Ninth Circuit observed that the default occurred during post-conviction proceedings and that ineffective assistance of post-conviction counsel could not serve as cause because Petitioner had no constitutional right to such counsel. *Cook II*, 538 F.3d at 1027. Petitioner clearly acted with diligence.

Reliance

The third factor is whether granting relief under Rule 60(b) would "'undo the past, executed effects of the judgment,' thereby disturbing the parties' reliance interest in the finality of the case." *Phelps*, 569 F.3d at 1137 (quoting *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987)). Post-judgment relief "is less warranted when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment." *Id.* at 1138.

In *Lopez*, the court found that the State's and the victim's interest in finality, especially after a warrant of execution has been obtained and an execution date set, weigh against granting post-judgment relief. 678 F.3d at 1136; *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (discussing finality in a capital case). Accordingly, this factor weighs against reopening Petitioner's habeas case.

Delay

The fourth factor looks at whether a petitioner seeking to have a new legal rule applied to an otherwise final case has petitioned the court for reconsideration "with a degree of promptness that respects the strong public interest in timeliness and finality." *Phelps*, 569 F.3d at 1138 (internal quotation omitted). Here, the motion was filed only days after the Supreme Court denied Petitioner's motion to file an untimely request for rehearing of the order denying certiorari of the Ninth Circuit's decision affirming the denial of habeas relief. And that motion was itself filed just two weeks following the Supreme Court's denial of Petitioner's certiorari petition from the Arizona Supreme Court's denial of his successive state post-conviction petition, in which Petitioner asserted a Sixth Amendment right to

effective post-conviction counsel. Petitioner did not delay seeking relief based on *Martinez*, and this factor weighs in his favor.

Close Connection

The fifth factor "is designed to recognize that the law is regularly evolving." *Phelps*, 569 F.3d at 1139. The mere fact that tradition, legal rules, and principles inevitably shift and evolve over time "cannot upset all final judgments that have predated any specific change in the law." *Id.* Accordingly, the nature of the change is important and courts should examine whether there is a "close connection" between the original and intervening decision at issue in a Rule 60(b)(6) motion. *Id.*

In *Phelps*, the intervening change in the law directly overruled the decision for which reconsideration was sought, and this factor supported reconsideration. The same cannot be said here because Petitioner's procedural default occurred during appeal of his post-conviction petition, not its initial filing.

In *Martinez*, the petitioner's post-conviction counsel failed to raise any trial ineffectiveness claims in the initial state post-conviction petition. When Martinez later sought to raise trial ineffectiveness claims in a successive state post-conviction petition, the claims were found precluded under state law and then found procedurally defaulted in federal habeas proceedings. In carving out a narrow exception to the rule that ineffectiveness of post-conviction counsel cannot constitute cause for a procedural default, the Court in *Martinez* emphasized that the

> rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, *including appeals from initial-review collateral proceedings*, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. It does not extend to attorney errors in any proceeding *beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial*, even though that initial-review collateral proceeding may be deficient for other reasons.

Martinez, 132 S. Ct. at 1320 (citations omitted; emphasis added).

In this case, Petitioner's post-conviction counsel raised his pre-trial ineffectiveness claims in the initial post-conviction petition (the "first occasion" to raise such claims), and

they were denied on the merits by the state court following an evidentiary hearing. However, post-conviction counsel failed to include the ineffectiveness claims in a motion for rehearing from the denial of post-conviction relief or in a discretionary petition for review to the Arizona Supreme Court, both of which were necessary steps at that time to properly exhaust the claims in state court and, consequently, for federal habeas review. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (requiring state prisoners to complete one round of state's established appellate review process to exhaust claims for federal review); *Cook II*, 538 F.3d at 1026 ("Prior to the amendments to Rule 32.9, the failure of the petitioner to file a motion for rehearing setting forth in detail the grounds for rehearing waived further review.").

Under the plain language of *Martinez*, post-conviction counsel's failure to appeal the state court's denial of the ineffectiveness claims cannot constitute cause for the procedural default because the *Martinez* exception does not extend to attorney errors "beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." 132 S. Ct. at 1320; *see also Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) ("Arnold's multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal. Thus, unlike Martinez, Arnold has already had his day in court; deprivation of a second day does not constitute cause."). Indeed, as recognized by the Ninth Circuit in this case, under Arizona law a defendant is entitled to counsel only through the disposition of a first post-conviction petition. *Cook II*, 538 F.3d at 1027; *see also Smith*, 184 Ariz. at 459, 910 P.2d at 4 ("Our constitution does not require, and the rules do not extend, the right to appointed counsel for indigent defendants in Rule 32 proceedings beyond the trial court's mandatory consideration and disposition of the PCR.") "Because Cook had no constitutional right to counsel *at the motion for rehearing stage*, any errors by his counsel could not constitute cause to excuse the default." *Cook II*, 538 F.3d at 1027 (emphasis added) (citing *Coleman* and *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990)). The lack of connection between Petitioner's case and *Martinez* weighs heavily against reconsideration.

Comity

The last factor concerns the need for comity between independently sovereign state and federal judiciaries. *Phelps*, 569 F.3d at 1139. The Ninth Circuit has determined that principles of comity are not upset when an erroneous legal judgment, if left uncorrected, "would prevent the true merits of a petitioner's constitutional claims from ever being heard." *Id.* at 1140. For example, in *Phelps*, the district court dismissed the petition as untimely, thus precluding any federal habeas review of the petitioner's claims. The court found that this favored the grant of post-judgment relief because dismissal of a first habeas petition "denies the petitioner the protections of the Great Writ entirely." *Id.*

Here, the Court's judgment did not preclude review of all of Petitioner's federal constitutional claims. A number of the claims, including the trial court's failure to inquire about the ineffectiveness of counsel before permitting Petitioner's waiver of counsel, were addressed on the merits in both the district and appellate courts. More critically, the state court held an evidentiary hearing and considered the merits of Petitioner's pre-trial ineffectiveness claims. Additionally, the state court recently considered the merits of Petitioner's expanded sentencing ineffectiveness claim during the third PCR proceeding. In light of these circumstances, the comity factor does not favor Petitioner.

Conclusion

The Court has evaluated each of the factors set forth in *Phelps* in light of the particular facts of this case. Some weigh in Petitioner's favor. However, the Court finds that the lack of connection between Petitioner's case and the *Martinez* decision is a substantial factor that, when weighed with the reliance and comity factors, tips the balance against granting post-judgment relief. Accordingly, the Court concludes that Petitioner's motion to reopen judgment fails to demonstrate the extraordinary circumstances necessary to grant relief under Rule 60(b)(6).

III. Cause for Procedural Default

Even if the Court granted the motion under Rule 60(b) to reconsider whether Petitioner can establish cause for his procedural default, Petitioner would not be entitled to

the relief he seeks for two reasons. First and foremost, as already discussed, the Supreme Court's holding in *Martinez* does not apply to alleged ineffectiveness by post-conviction *appellate* counsel, and the procedural default at issue here occurred when Petitioner's post-conviction counsel failed to preserve the pre-trial ineffectiveness claims for appeal. Second, Petitioner has not demonstrated that the defaulted ineffectiveness claim is substantial. Therefore, even if the narrow *Martinez* exception applied, it does not provide cause to excuse the procedural default here.

In *Martinez*, the Court held that a prisoner must demonstrate that the underlying ineffectiveness claim is a substantial one to overcome any procedural default of that claim. 132 S. Ct. at 1318. "Thus, *Martinez* requires that a petitioner's claim of cause for a procedural default be rooted in 'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Lopez*, 678 F.3d at 1137-38 (citing *Martinez*, 132 S. Ct. at 1318); *see also Leavitt v. Arave*, No. 12-35427, 2012 WL 2086358, at *1 (9th Cir. June 8, 2012). Under *Strickland v. Washington*, 466 U.S. 668, 687 (1994), an ineffective assistance claim requires a showing that counsel's performance was both "deficient" and "prejudicial" to the petitioner's case.

Petitioner argues that pre-trial counsel was ineffective for failing to conduct a prompt investigation into mitigation early in the case. (Doc. 118 at 24-25.) Although neither his initial state post-conviction petition nor amended federal habeas petition detail what counsel should have done or what potentially mitigating evidence would have been uncovered, Petitioner asserts in his Rule 60(b) motion that a thorough investigation of Petitioner's childhood would have revealed a history of physical and sexual abuse by family members, as well as repeated sexual abuse by a house parent and a gang rape by peers when Petitioner was 15 and living at a group home for boys. He further asserts that a proper investigation would have revealed that he has a history of alcohol and drug abuse resulting from his traumatic upbringing, attempted suicide on numerous occasions, and suffers from post-traumatic stress disorder and impaired cognitive functioning.

Prior to trial and his waiver of counsel, Petitioner was evaluated by two mental health experts to determine competency at the time of the offense and competency to stand trial.

Dr. Daniel Wynkoop, a psychologist, detailed Petitioner's background and history, including his unstable early homelife, juvenile delinquency, early onset of drug and alcohol use, sexual abuse by a house parent at a boys' home, sexual molestation at a bus station, repeated hospitalizations for depression and suicidal tendencies, and difficulty maintaining employment and relationships. Psychological testing revealed adequate intellectual resources but some deficits in understanding cause and effect relationships, lack of social judgment, and some failure to understand the implications of behavior. Dr. Wynkoop diagnosed Petitioner as having a borderline personality disorder, with alcohol, amphetamine, and marijuana addictions. He observed nothing to suggest organic brain damage or a thought disorder. In Dr. Wynkoop's view, Petitioner's alcohol and drug use at the time of the crime likely impaired his ability to exercise judgment.

Dr. Eugene Almer, a psychiatrist, also described some of Petitioner's social history. He observed that Petitioner's mother was an alcoholic with a manic depressive illness, who was frequently hospitalized, and that Petitioner lived in various foster and group homes. Petitioner relayed that he began drinking at 14, smoking marijuana at 15, taking barbiturates and hallucinogenics at 16 and 17 respectively, and using amphetamines at 25. Dr. Almer reviewed "a great number of medical records" from hospitals in Wyoming and Arizona, including voluminous records from the Kingman Regional Hospital that are "replete with psychological reports, psychiatric evaluations and numerous treatment records" describing "various types of alcohol and drug abuse and personality disorder problems in addition to the diagnosis of depression or dysthymic disorder." Dr. Almer also reviewed a September 1987 investigative report that included a taped interview of Petitioner's mother and stepfather, who described Petitioner's life history, psychiatric problems, acting-out behavior, and various stays at institutions as a teenager. In addition, Dr. Almer noted that a CT scan from 1982 was normal. With regard to Petitioner's mental state at the time of the offense, Dr. Almer concluded that Petitioner probably was under the heavy influence of alcohol and drugs, which seriously impaired his judgment and produced more impulsive behavior.

From these evaluations, it is evident that pre-trial counsel obtained a substantial

number of records and background information concerning Petitioner. He also enlisted an investigator to interview, at minimum, Petitioner's mother and stepfather. Whether counsel would have pursued additional mitigating evidence had he remained on the case cannot be known. Consequently, the Court concludes that Petitioner cannot establish deficient performance. However, even assuming pre-trial counsel acted deficiently, Petitioner "fails to meet the *Martinez* test of substantiality as to prejudice." *Lopez*, 678 F.3d at 1138; *see also Leavitt*, 2012 WL 2086358, at *1 (finding no substantial ineffectiveness claims where record demonstrated no prejudice from alleged ineffectiveness).

Petitioner's first prejudice argument relies on a declaration from the prosecutor stating that he would not have sought the death penalty if he had known of Petitioner's abusive childhood and mental problems. However, in addressing this "newly discovered" evidence during the third PCR proceeding, the state court expressly rejected the argument as the "ultimate in speculation . . . based on the assertion of a prosecutor 23 years after the fact that he would have made a different charging decision." *State v. Cook*, No. CR-9358, at 3 (Maricopa Co. Sup. Ct. Jan. 11, 2011). The court further explained:

> To the extent that Mr. Larsen's opinion is relevant, the question is not what the Eric Larsen of today, having practiced criminal defense for at least the last 15 years, would do in a case involving identical facts if he were somehow to be appointed as a special prosecutor in a potential capital case. The question is what the prosecutor Eric Larsen would have done back in 1987 and 1988 without the benefit of the experience of criminal defense work, including defense of capital cases, to broaden his horizons and perspectives.
>
> The Court would like to avoid getting into a discussion of personalities in this Order and recognizes that a determination of credibility based solely upon affidavits is improper, unless perhaps an affidavit is inherently incredible on its face. The Court recalls, however, that Mr. Larsen was an aggressive prosecutor and that there were times when he and the Court clashed as to how the Court handled this case. The Court also recalls an unrelated case prosecuted around this same time by Mr. Larsen in which a defendant claimed that his sentence should be mitigated by a diagnosis of post-traumatic stress disorder. The Court recalls that Mr. Larsen, who had served in the military, indicated that many military personnel, presumably including himself, did not necessarily believe in the viability of post-traumatic stress disorder as a psychiatric diagnosis and that it should not be treated as a relevant consideration in sentencing.
>
> The Court acknowledges that it is skating on thin procedural ice by making these comments because it may seem to be deciding issues of credibility based on affidavits rather than sworn testimony subject to cross-

> examination. The Court is engaging in this analysis mainly to point out the problems inherent in trying to determine how a prosecutor would have exercised his discretion 23 years ago with the added knowledge of a diagnosis of post-traumatic stress disorder but without the added experience and perspective he undoubtedly gained in the ensuing years.
>
> The Court is also aware that in 1987 and 1988, long before the *Ring* decision changed the landscape of capital sentencing, the Mohave County Attorney's Office sought the death penalty on a fairly regular basis. This was a case involving the torture, mutilation and eventually killing of 2 completely innocent victims who had the misfortune of working with and knowing the Defendant and the co-defendant in this case. It is unfathomable to the Court that the Mohave County Attorney's Office during the time that this case was pending would not have sought the death penalty even for a defendant who was known to have been diagnosed with post-traumatic stress disorder.
>
> The Court finds that the affidavit from the former prosecutor of this case is speculation and conjecture.

Id. at 4-5.

This Court concurs in the conclusion of the state court that Petitioner cannot establish prejudice from pre-trial counsel's alleged failure to conduct a timely mitigation investigation by claiming more than 20 years after trial that the prosecutor would not have sought the death penalty. The prosecutor was aware prior to trial of Petitioner's mental difficulties, alcohol and substance abuse problems, and history of attempted suicides. He was also well versed in the facts of these gruesome murders. As noted by the state court, it is pure speculation to say what probably would have occurred had the prosecutor been provided additional information about Petitioner's difficult childhood and newly-diagnosed post-traumatic stress disorder.

Petitioner also argues that development of a mitigation case would have ensured that such information was available to and considered by the sentencing judge. Even though Petitioner chose not to argue for leniency or present mitigation during the sentencing hearing, in his view there is a reasonable probability the mental health experts who evaluated him before trial would have determined that he suffered from post-traumatic stress disorder if they had known more about his background and, consequently, the trial court would not have sentenced him to death. This argument is also unpersuasive because, like the prosecutor's decision to seek the death penalty, it rests on speculation about the experts and assumes any

additional evidence developed by pre-trial counsel would have been available to the sentencing judge despite Petitioner's decision not to make a mitigation presentation. *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (finding no prejudice under *Strickland* where the defendant would have refused to allow counsel to present mitigation regardless of what information counsel might have uncovered during a more thorough investigation).

Moreover, the trial judge who actually sentenced Petitioner has considered the newly-developed mitigation evidence and concluded there is no reasonable probability the sentencing outcome would have been different:

> This is not a case where the Court has to speculate about whether new evidence might have caused a jury to reach a not guilty verdict had they known of such evidence. This is not a case where the Court has to speculate about whether new evidence might have caused a jury to not recommend a death sentence had they known of such evidence. Only the Court knows for sure what it would have done, and the only speculation involved is in the process of remembering the judicial officer that it was 22 years ago.
>
> The Court certainly recognizes the problems inherent in this analysis. Counsel may have a legitimate concern that the Court can say whatever it wants in an order, without testifying under oath, being cross-examined or subjected to impeachment. The fact remains that this Court has had to make similar decisions in countless Rule 32 proceedings in which claims were made that different circumstances, usually involving more effective representation, would have resulted in different sentences being imposed. The fact that this is a death penalty case does not change the process, it just heightens the significance of the process. The Court determines unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty.
>
> . . . .
>
> The Court concludes for all the above reasons that the subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision by the Court. The recent diagnosis is not material under Rule 32.1(e) because it would not have probably resulted in a different sentence being imposed by this Court.

State v. Cook, No. CR-9358, at 6-7 (Maricopa Co. Sup. Ct. Jan. 11, 2011).

Petitioner cites caselaw demonstrating that an ineffectiveness claim may be established even where a defendant takes over his own representation. However, the claimed deficiency still must satisfy both the performance and prejudice prongs of *Strickland*. As just

discussed, Petitioner cannot make that showing here. Accordingly, even if the *Martinez* exception applied, Petitioner has not demonstrated that post-conviction counsel was ineffective for failing to raise a substantial sentencing ineffectiveness claim.

CERTIFICATE OF APPEALABILITY

To the extent a certificate of appealability is needed for an appeal from this Order, *see United States v. Washington*, 653 F.3d 1057, 1065 n.8 (9th Cir. 2011) (noting open question whether COA required to appeal denial of legitimate Rule 60(b) motion), *cert. denied*, 132 S. Ct. 1609 (2012), the Court finds that reasonable jurists could debate its denial of Petitioner's Rule 60(b)(6) motion. *See* 28 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the Court grants a certificate of appealability on this issue.

Based on the foregoing,

IT IS ORDERED that Petitioner's Motion for Relief from Judgment Pursuant to Rule 60(b)(6) (Doc. 118) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion for Stay of Execution (Doc. 121) is **DENIED**.

DATED this 6th day of July, 2012.

Robert C. Broomfield
Senior United States District Judge

Michael J. Meehan, Arizona Bar No. 2892
LAW OFFICE OF MICHAEL MEEHAN
3938 E. Grant Rd. No. 423
Tucson, Arizona 85712
Telephone: (520) 529-1969
mmeehan.az@msn.com

FEDERAL PUBLIC DEFENDER
Capital Habeas Unit
850 W. Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone: (602) 382-2816
Facsimile: (602) 889-3960
Dale A. Baich, Ohio Bar No. 0025070
Robin C. Konrad, Alabama Bar No. 2194-N76K

Attorneys for Petitioner
Daniel Wayne Cook

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

[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

---

[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.

[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 . . .

---

[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

---

[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.

---

[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.

LAW OFFICE OF MICHAEL MEEHAN
3939 E. Grant Rd. No. 423
Tucson, Arizona 85712

FEDERAL PUBLIC DEFENDER
Capital Habeas Unit
850 W. Adams Street, Suite 201
Phoenix, Arizona 85007

By s/Michael J. Meehan

Attorneys for Petitioner
Daniel Wayne Cook

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.

s/Michelle Young
Legal Assistant
Capital Habeas Unit

Cook v. Ryan
Exhibits to Motion for Relief from Judgment
Pursuant to Rule 60(b)(6)

Exhibit 1: Declaration of Donna Marie Schwartz-Watts, M.D., dated November 21, 2010
Exhibit A: Curriculum Vitae of Donna Marie Schwartz-Watts, M.D.

Exhibit 2: Declaration of Eric Larsen, dated November 22, 2010

Exhibit 3: Letter from Tora L. Brawley, Ph.D., to Robin Konrad, dated September 30, 2010

Exhibit 4: Declaration of Donna Marie Schwartz-Watts, M.D.,dated March 11, 2010

Exhibit 5: Declaration of Tora L. Brawley, Ph.D., dated March 12, 2010

Exhibit 6: Curriculum Vitae of Tora L. Brawley, Ph.D.

Exhibit 7: Declaration of Wanda Dunn, dated April 8, 2010

Exhibit 8: Declaration of Debrah Howard, dated November 15, 2010

Exhibit 9: Declaration of James Stone, dated March 10, 2011

Exhibit 10: Declaration of Kathy Lynn Dunn, dated February 14, 2011

Exhibit 11: Declaration of Cynthia Kline, dated March 11, 2011

Exhibit 12: Declaration of Thomas Monroe Maas, dated March 17, 2011

Exhibit 13: Declaration of Jack Donahue, dated March 18, 2011

Exhibit 14: Declaration of Patricia Rose, dated February 10, 2011

Exhibit 15: Declaration of David Overholt, dated November 23, 2010

Exhibit 16: Affidavit of Custodian of Record Losa Angeles County, dated March 1, 2011

Exhibit 17: Declaration of Howard Smith Bennett, dated March 29, 2009

Exhibit 18: Convicted Child Molester and Rapist Gets 214 years - Judge Says the Case "Cries Out for an Exceptional Sentence." *The News Tribune,* February 20, 1998

Exhibit 19: Photograph of Howard Bennett: *California v. Bennett*, Case A528295 State of California Dept of Justice, *Megan's Law Homepage*

Exhibit 20: Letter to the Clemency Bard from Lisa Maas, undated

Exhibit 21: Letter to the Clemency Board from Patricia Golembieski, dated March 22, 2011

Exhibit 22: Idaho State Hospital Records, 1981-82

Exhibit 23: Wyoming State Hospital Records, 1980-81

Exhibit 24: Army Records, 1979-80

Exhibit 25: Report of B. Anthony Dvorak, M.D., F.A.C.S., February 13, 1988

Exhibit 26: Report of Eugene R. Almer, M.D., December 14, 1987

Exhibit 27: McKinley Children Center Discharge Summary, 1976-77

Exhibit 28: Daniel Wayne Cook School Records, Bonita Unified School District, 1977-79

Exhibit 29: Declaration of Michael Terribile, dated March 30, 2009

EXHIBIT 1

Declaration of Donna Marie Schwartz-Watts, M.D.

I, Donna Marie Schwartz-Watts, M.D., declare under penalty of perjury:

1. I am a physician licensed to practice medicine.

2. I completed medical school in 1989, and graduated from the University of South Carolina School of Medicine.

3. I am Board Certified in General Psychiatry and have Added Qualifications in Forensic Psychiatry. My curriculum vitae is attached to my declaration as Exhibit A.

4. From June 1997 until June 2010, I was an Associate Professor and then Professor of Clinical Psychiatry and the Director of Forensic Services in the Department of Neuropsychiatry at the University of South Carolina School of Medicine. During my tenure at the University, I taught residents as well as treated patients. I also conducted research and presented and published papers. I also conducted thousands of forensic evaluations.

5. I am presently employed at Bryan Psychiatric Hospital as a Senior Psychiatrist. I treat people with post-traumatic stress disorder (PTSD) on a frequent basis. The treatment team I work with routinely screen all patients we treat for PTSD with a questionnaire. Many of our patients would not be diagnosed were it not for this specified form of screening.

6. I also conduct psychiatric evaluations at the request of clients, attorneys, and courts in both criminal and civil cases. From November 1998 until June 2009, I served as a court-appointed psychiatrist (through a contract with the Department of Mental Health) under the South Carolina Sexually Violent Predator Statute. I have extensive experience with individuals who have both been sexually abused and sexual abusers.

7. In September 2009, I was contacted by Assistant Federal Public Defender Robin Konrad and, upon her request, I agreed to evaluate her client Daniel Cook in preparation for clemency proceedings.

8. Due to my schedule and other client priorities, the first available time that I could evaluate Mr. Cook was January 2010. I met with Mr. Cook for five hours at the Browning Unit of the Arizona Department of Corrections. My initial evaluation consisted of an interview and mental status examination. This was a non-contact interview conducted between a plexiglass window, which is consistent with the policies of the Arizona Department of Corrections.

9. After my initial evaluation of Mr. Cook and my review of his records, I concluded that he likely suffers from symptoms that alone or in combination can be consistent with cognitive dysfunction and/or brain damage. I also informed Ms. Konrad that it was my opinion that Mr. Cook required a complete neuropsychological evaluation to determine his present cognitive functioning.

10. In addition to my initial evaluation, I interviewed Mr. Cook on three other occasions: for two hours on March 2, 2010 (with Ms. Konrad present for part of the visit); for one hour on August 4, 2010; and for two hours on October 15, 2010 (with Ms. Konrad present for the entire visit). These additional interviews with Mr. Cook were necessary in order to develop rapport, to gain his trust, and learn information regarding his trauma.

11. I have reviewed numerous records related to Mr. Cook including, but not limited to:
    - Birth certificate of Daniel Wayne Cook;
    - McKinley Home for Boys Discharge Summary, by Maryann Downing, 1/29/76-12/1/77
    - San Dimas High School records
    - Saugus High School records
    - Desert Winds and Quartz Hill High School records
    - Army Reserve Records, 1979-1980
    - Wyoming State Hospital records, 12/1/80-1/21/81
    - GED certificate, 1/8/81
    - Idaho State Hospital records, 12/11/81-3/9/82
    - Letter to Beckie and Shawn from Daniel Cook, 7/2/87
    - Letter to Barb, Beckie, Shawn from Daniel Cook, 6/15/87
    - Calendar dated July 1987, August 1987
    - Presentence Investigation Report Daniel Cook, 8/8/1988

- Supplemental Presentence Investigation–Letter from Daniel Cook, 8/4/88
- Arizona Department of Corrections records
- St. Mary's Hospital Records, 2000
- Psychological Evaluation of Daniel Cook by Daniel Wynkoop, Ed.D, 11/3/87
- Psychiatric Evaluation of Daniel Cook by Eugene Almer, M.D., P.C., 12/14/87
- Letter from Dr. Almer to Judge Conn 1/18/88
- Neurological Evaluation of Daniel Cook by B. Anthony Dvorak, M.D., F.A.C.S., 2/13/88
- *State v. Cook* Transcripts, 8/4/88, 8/8/88
- Declaration of Howard Bennett, 3/27/09
- Declaration Wanda Dunn, 4/8/2010
- Declaration Debrah Howard, 11/16/2010
- Report of Dr. Brawley, 9/30/2010
- Videotaped Interview of John Matzke, 7/21/87
- Interview transcript of John Matzke, 12/17/87
- Psychological Evaluation of John Matzke by Daniel Wynkoop, Ed.D, 10/1/87
- Psychiatric Consultation of John Matzke by Otto Bendheim, M.D., 10/13/87

12. In addition to reviewing records, I also consulted with Dr. Tora Brawley, and I briefly interviewed Mr. Cook's mother in person on October 15, 2010.

13. I reached several diagnoses regarding Mr. Cook, but was able to do so only after I was provided with the neuropsychological test data and necessary background information by way of records, witnesses, and from Mr. Cook himself. While I was initially hired for clemency purposes, I was asked to provide an opinion specifically related to Mr. Cook's diagnoses at the time of trial. It has taken me approximately one month to complete this task. The Diagnostic and Statistical Manual used to diagnose Mr. Cook at the time of his trial has undergone two revisions. The diagnoses in this declaration will correlate with the Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, 1987 (DSM-III-R), which was in use at the time Mr. Cook was evaluated pursuant to his charges.

14. Based on my review of the records provided, my interviews with Mr. Cook and Wanda Dunn, and my consultation with Dr. Brawley, I offer the following information and opinions.

15. Mr. Cook was born in Chicago, Illinois, three months premature on July 23, 1961, to Wanda Dunn and Gordon Cook. While Wanda was pregnant with Mr. Cook, she consumed alcohol and was physically abused by Gordon. Wanda was not treated by a doctor while pregnant with Mr. Cook.

16. When Mr. Cook was an infant, his father would beat him with a belt and burn him with cigarettes. Wanda noticed a cigarette burn on Mr. Cook's penis when he was five months old.

17. Mr. Cook has a sister, Debrah Howard, who is eleven months older than him.

18. By age three, Mr. Cook and his sister were sent to live with his grandmother and step grandfather. He lived with his grandparents until he was nine, when his grandmother died. While under the care of his grandparents, Mr. Cook and his sister were sexually abused by their grandfather. Mr. Cook's grandfather made Mr. Cook and his sister sexually molest each other. Mr. Cook also observed and overheard his grandfather molest his sister. Mr. Cook and his sister shared a room, and Mr. Cook would wake up to his sister was crying. He saw his grandfather on top of his sister. Debrah confirmed that she was sexually assaulted by her grandfather.

19. Mr. Cook was also physically abused by his grandparents. Wanda reports that her mother would tie Mr. Cook and his sister to chairs. Mr. Cook's sister Debrah reports that their grandparents did not properly feed them as children. When they were given a decent meal, which was cottage cheese and fruit, Mr. Cook vomited. His grandparents forced him to eat his own vomit.

20. Debrah reports that Mr. Cook's grandparents were alcoholics who dragged her and Mr. Cook into taverns as young children.

21. Mr. Cook reports that during the period of time which would have coincided with visits to his mother, she would sexually abuse him. Mr. Cook would be asleep on the couch and wake up to find his clothes removed and his mother fondling him. Mr. Cook also reports that his mother would beat him and then fondle him to make him feel better.

22. When their grandmother died, Mr. Cook and his sister went to live with their mother and her new husband, John Dunn, and his children. John was twenty-three years older than Wanda, and he had seven children and several former wives.

23. Mr. Cook lived with his mother and stepfather from ages nine to fourteen.

24. Mr. Cook's mother reports that Mr. Cook was in special education classes in primary school. Limited school records from high school were provided, and Mr. Cook's attorney indicates that the attempt to obtain all of his school records was unsuccessful.

25. Wanda reports that John Dunn treated Mr. Cook and his sister differently from his own children. Mr. Cook and Debrah report that John Dunn did not want them and did not accept them into the family.

26. Debrah and Wanda report that John Dunn was physically abusive, and he would beat Mr. Cook viciously with a belt. Debrah and Mr. Cook report that Wanda was also physically abusive.

27. Debrah reports that there were no sexual boundaries in the Cook-Dunn household. Mr. Cook reports, and his half-brother George Dunn confirms, that one of their older step-brothers sexually abused both Mr. Cook and George when they were children. Mr. Cook reports that, as children, he and his sister had a sexual relationship, and Debrah confirmed that they crossed sexual boundaries.

28. While Mr. Cook was a young adolescent, he experienced his mother's many attempted suicides. After Wanda tried to kill herself, Mr. Cook's stepfather would blame him and his sister for their mother's actions. Wanda reports that she suffers from bipolar disorder and anxiety.

29. When Mr. Cook was fourteen, his mother gave up custody of him, and he was placed in McKinley Home for Boys in January 1976. A two-page discharge summary from McKinley Home for Boys is the only record provided to me related to Mr. Cook's time as a ward of the State of California. It is my understanding from Mr. Cook's counsel that his juvenile records have been lost.

30. While at McKinley Home, Mr. Cook was sexually abused by house parent Howard Bennett. Mr. Cook states that he would be placed in a time-out room for 72 hours, where the staff took away his clothes and cuffed him to a bed. Mr. Bennett would come abuse him while he was in time out. Mr. Bennett admitted to sexually abusing Mr. Cook. Mr. Bennett is now incarcerated in the State of Washington for several counts of sexual abuse involving children. Mr. Cook states that he informed Mr. Waterson, who was an administrator at McKinley home, that Mr. Bennett had sexual pictures of Mr. Cook. Mr. Waterson dismissed Mr. Cook's allegation by saying that the staff does not do things like that. According to a former board member, Mr. Waterson was later investigated for inappropriate sexual contact with the boys at McKinley Home. During the investigation, there were discussions regarding a peek-a-boo room with a one-way mirror that was used for the boys as a time-out room. Mr. Waterson's dismissal went unchallenged and occurred very quickly.

31. Mr. Cook also reports that he was hogtied and raped by other males at McKinley Home who he called Bennett's enforcers. Mr. Cook reports running away from McKinley Home on several occasions. Mr. Cook reports that when he ran away, he prostituted himself for money. Mr. Cook reports that, during one occasion, he was raped while he was at a Greyhound Bus Station. He was threatened at gunpoint. Mr. Cook's discharge summary from McKinley Home states that he went AWOL on three separate occasions lasting for several days each time. The last occasion that Mr. Cook went AWOL, McKinley Home terminated him from its roles.

32. Mr. Cook's discharge summary from McKinley Home also reports that Mr. Cook was circumcised in the winter of 1976, when he was fifteen. Mr. Cook reports that Mr. Bennett instructed him to have the circumcision.

33. The discharge summary also reports that Mr. Cook dislocated his thumb in spring of 1977, and later re-injured it three more times. Mr. Cook reports long-standing continual self-injury behavior, including breaking his thumbs, cutting himself, and starving himself. His records from the Department of Corrections indicate a hunger strike in June-July, 2000.

34. Mr. Cook reports that while he was in the McKinley Home, his mother moved to Arizona without telling him. The discharge summary from McKinley Home confirms that Mr. Cook's family moved to Arizona in fall of 1976, and promised that Mr. Cook could return to live with them, but it did not happen.

35. The discharge summary notes that Mr. Cook participated in ongoing psychotherapy and references the diagnosis of overanxious reaction of adolescence.

36. Mr. Cook was discharged from McKinley Home in December 1977, at age sixteen. Mr. Cook spent time in other foster homes in California. Mr. Cook reports that the people who broke the cycle of abuse were his foster parents, Tom and Lisa Maas. School records from 1978 indicate that he lived with the Maas' at that time. Mr. Cook attended Saugus High School from February 5, 1979, until May 14, 1979, where it indicates he withdrew to move to Arizona. Mr. Cook was seventeen years of age.

37. However, records from the Wyoming State Hospital indicate that Mr. Cook moved to Idaho and lived with another foster mother, Barbara Williamson. While in Idaho, he was arrested a few times for public intoxication between 1979 and 1980.

38. In December 1979, Mr. Cook enlisted in the United States Army Reserve in Boise, Idaho. The following month, on January 8, 1980, Mr. Cook began active duty in Fort McClellan, Alabama. While in training, Mr. Cook was written up for consuming alcohol. On February 25, 1980, he attempted suicide by overdosing on several medications: Tigan□, Entex□ Acetominophen, and Donnatal□ The Sergeant First Class who authored Mr. Cook's counseling report under the Trainee Discharge Program stated that he had no doubt that

Mr. Cook would attempt suicide again. Mr. Cook was honorably discharged from the Army Reserve on March 18, 1980.

39. Mr. Cook returned to Idaho to live with foster mother Barbara Williamson. Mr. Cook drank heavily while he was in Idaho. Records indicate that in August 1980, Mr. Cook and two friends went to Wyoming to find work. Records indicate that Mr. Cook remained in Wyoming with a Mrs. Dennis Ward, and Mr. Cook was a truck driver. Mr. Cook was fired from his job on November 25 because of alcohol abuse.

40. At the end of 1980, three days after he lost his job, Mr. Cook was admitted to the Sweetwater County Hospital in Wyoming for attempted suicide through overdose on Sleep Eze He was also abusing alcohol. On December 1, 1980, he was admitted to Wyoming State Hospital. At age nineteen, this was Mr. Cook's first psychiatric hospitalization.

41. While being treated at Wyoming State Hospital, Mr. Cook admitted to previous blackouts. He was described as "having little or no self esteem and views himself as worthless. Apparently, he uses alcohol to soften these feelings." Mr. Cook admitted to being hospitalized on eight or ten occasions for alcohol related reasons, and that he becomes very ill and is unable to care for himself. It was also reported that Mr. Cook has deep underlying feelings of not being wanted, needed, or loved.

42. A Wyoming State Hospital employee interviewed Barbara Williamson, who reported that Mr. Cook was reported to have hang-ups about living with his mother and that he needs her love. Ms. Williamson also reported that Mr. Cook had returned home to his mother on several occasions, only to be hurt and rejected. Mr. Cook indicated during therapy sessions that he is unwilling to admit that his mother does not want him. "He needs her love and is always willing to give it one more try, although he knows it will result in pain." A Wyoming State Hospital counselor's report notes that he spoke with Mr. Cook's mother and "had never talked to a colder, more heartless person in his many years of social work."

43. Mr. Cook obtained his G.E.D. Certificate on January 8, 1981, while in the hospital.

44. On January 20, 1981, Mr. Cook was released from Wyoming State Hospital upon a finding that he was not a danger to himself or to others. During his stay, he was reported to have participated in much of his treatment and was reported as cooperative. Mr. Cook was diagnosed with alcohol addiction, and passive aggressive personality with antisocial features. The release summary noted that Mr. Cook was returning to Salmon, Idaho to live with Barbara Williamson.

45. Mr. Cook returned to Idaho and lived with Ms. Williamson. Mr. Cook did odd jobs and worked in forestry. Mr. Cook was drinking and saw a psychologist and a social worker.

46. On December 11, 1981, at age twenty, Mr. Cook, accompanied by his social worker, voluntarily entered the Idaho State Hospital. He was consuming a lot of alcohol, and he attempted to kill himself with a shotgun but could not reach the trigger. His girlfriend broke up with him three or four days prior to his admission into the hospital. In the admission record, it notes that Mr. Cook was underweight, being seventy inches tall and weighing only 127 pounds. Mr. Cook was living with Ms. Williamson who he referred to as a foster mother, although she legally was not his foster mother.

47. During his time in the Idaho State Hospital, it was noted that Mr. Cook has a tendency to handle stress by abusing alcohol.

48. On March 9, 1982, Mr. Cook left the Idaho State Hospital against professional advice to get married to Laura, a staff member he met at the hospital. Records indicate that Laura is referred to his common law wife. When he left, records indicate that he was diagnosed with alcohol abuse with depression and dependent personality disorder.

49. One week later, on March 16, 1982, Mr. Cook was readmitted to the Idaho State Hospital for attempted suicide. Mr. Cook became depressed after not being able to find employment and overdosed on Laura's medication, taking 15 to 30 Mysoline tablets. Mr. Cook was initially seen at Bingham Memorial Hospital Emergency Room for acute treatment and referred to the state hospital.

50. Idaho State Hospital records indicate that Mr. Cook sometimes feels depressed and suicidal even while sober. Records also note that Mr. Cook could function at a high level for a period time, but as soon as any stressful situation occurred, he would become angry, depressed, and attempt suicide. Mr. Cook also had periods when he was very impulsive and acted without thinking.

51. On March 22, 1982, Mr. Cook jumped over the door watch table and left the hospital, running toward the town. Idaho State Hospital records indicate that Laura withdrew $4000 from her bank account and had purchased Greyhound bus tickets. Mr. Cook was discharged from the hospital on March 23, 1982.

52. Mr. Cook and Laura moved to Kingman, Arizona. They eventually parted ways.

53. Mr. Cook spent time in and out of the hospital while in Arizona, but according to Mr. Cook's counsel, there records have been destroyed. The reports prepared before Mr. Cook's trial by Drs. Wynkoop, Almer, and Dvorak, however, make detailed reference to his times in the hospital. I rely upon Drs. Wynkoop, Almer, and Dvorak for information regarding Mr. Cook's hospitalization history during this period.

54. On August 30, 1982, Mr. Cook was admitted to Mohave General Hospital for suicidal behavior according to the presentence report. He was diagnosed by Dr. Ruland with passive aggressive personality with depressive and behavior episodes.

55. On September 4, 1983, Mr. Cook was admitted to the hospital based on a suicidal gesture, and given a diagnosis of schizophrenia and alcohol abuse. (Report of Dr. Dvorak.)

56. On August 8, 1984, Mr. Cook was admitted to the emergency room for inflicting wounds on his left forearm with razor blade. (Reports of Drs. Almer and Dvorak.)

57. On November 18, 1984, Mr. Cook was hospitalized and given a diagnosis of acute psychosis and alcohol ingestion. (Report of Dr. Dvorak.)

58. On November 21, 1984, Mr. Cook's records indicate alcohol overdose, rule out head injury, and oral facial injury with dental involvement. Psychiatrist Dr. Ruland was consulted and Mr. Cook was discharged with instructions to follow up with Dr. Ruland. (Report of Dr. Dvorak.)

59. At some point in 1986, Mr. Cook became romantically involved with a woman named Barbara who he met in Kingman. Barbara had two children, Beckie and Shawn. Mr. Cook reports that he loved Barbara very much. According to a calendar found in Mr. Cook's apartment when he was arrested, they broke up in March 1987. The calendar counts each day that Mr. Cook was without Barbara. Two letters written by Mr. Cook (one dated June 15, 1987, and the other July 2, 1987), were also seized when Mr. Cook was arrested. In his letter of June 15th, Mr. Cook expresses his love for Barbara and says that he is working at Bob's Big Boy and making advancements in his job. The letters says that all he wanted was to be with her and her children as a family.

60. On Friday, July 17, 1987, Mr. Cook quit his job at Bob's Big Boy after his boss made remarks about Barbara and told Mr. Cook to leave his problems at home. Mr. Cook's calendar notes on Saturday, July 18: "Barb & Kids gone Mar. 03, 1987."

61. Between Sunday evening, July 19, and into early Monday morning, July 20, Carlos Froylan Cruz-Ramos and Kevin Swaney were killed. On Tuesday, July 21, 1987, at 4:31am, John Matzke went to the Lake Havasu police department and confessed that he and Mr. Cook killed two people, stating that he killed Carlos and that Mr. Cook killed Kevin. Mr. Cook was arrested on the morning of July 21, 1987, for murder.

62. Mr. Cook and his roommate John Matzke were using crystal methamphetamine before July 19. Mr. Cook was using crystal methamphetamine on July 19, and had taken Valium® 40mg that same day. Mr. Cook and Matkze also consumed close to four cases of

beer the evening that Carlos and Kevin were killed. That same evening, Mr. Cook and Matzke also smoked marijuana.

63. John Matkze provided a videotaped confession and an interview for the defense. Mr. Matzke was also evaluated by Dr. Wynkoop. Mr. Matzke states that Mr. Cook was telling Carlos to take them to his leader. Mr. Matzke reports that Mr. Cook accused Carlos of being a spy. Mr. Matzke also reported that Mr. Cook was referring to Oliver North and the CIA, and Mr. Cook kept asking Carlos about his leader in Nicaragua. Mr. Matzke said he asked Mr. Cook why he was tying up Carlos, and Mr. Cook said because he was a communist and a Sandinista.

64. Mr. Cook had an outpatient evaluation with psychologist Daniel Wynkoop, Ed.D, on October 23, 1987. This evaluation was for the specific purposes of determining Mr. Cook's capacity to understand the proceedings and to assist in his defense and to determine if he had a mental disorder, which would prevent him from appreciating moral and legal right from wrong at the time of the offense.

65. Notably, Dr. Wynkoop had evaluated Mr. Cook's codefendant, John Matkze, one month before seeing Mr. Cook. Forensic evaluators are discouraged from examining codefendants due to potential methodological flaws. Having information not usually relied upon can affect the neutrality of the examiner's opinions.

66. Dr. Wynkoop issued a report on November 3, 1987. His report notes that Mr. Cook was sexually abused by a house parent while he was at McKinley Home for Boys, and that he was molested at a Greyhound bus station. The report notes that Mr. Cook was using crystal methamphetamine at the time of the offense.

67. Dr. Wynkoop conducted intelligence quotient testing and found Mr. Cook to have a Verbal Intelligence Quotient of 91, a Performance Intelligence Quotient of 95, and a Full Scale IQ of 92, which is average. Dr. Wynkoop diagnosed Mr. Cook with Adjustment Disorder, Substance Abuse, Borderline personality and Antisocial personality. Dr. Wynkoop found that Mr. Cook was competent to stand trial and that Mr. Cook was able to appreciate the difference

between right and wrong at the time of the crime, but noted that his judgment may have been impaired due to alcohol and drug use.

68. Mr. Cook had an outpatient evaluation with psychiatrist Eugene R. Almer, M.D., P.C., on November 17, 1987. The two purposes of his evaluation were to determine if Mr. Cook was competent to stand trial and to assess Mr. Cook's mental state at the time of the alleged crime.

69. Dr. Almer issued a report via letter to the court on December, 14, 1987. He noted that Mr. Cook had a mother with Bipolar Affective Disorder and alcoholism, who had been sober since 1983. He recorded Mr. Cook's polysubstance use including alcohol, cannabis, barbiturates, hallucinogens, and amphetamines. Dr. Almer noted that Mr. Cook was anxious on Mental Status Examination and had a tendency to be guarded. He also noted themes of emotional instability (which are consistent with Borderline Personality).

70. Dr. Almer reports that Mr. Cook had been taking amphetamines, Valium□, marijuana, and drinking beer (approximately 24) during the weekend of the crime.

71. Dr. Almer reviewed a "great number of medical records." Dr. Almer notes that the historical diagnoses in those records are primarily drug and alcohol abuse, personality disorders, and depression or dysthymic disorder.

72. Dr. Almer found that Mr. Cook was competent to stand trial. Dr. Almer opined that Mr. Cook was probably under heavy influence of alcohol and drugs at the time of the crime, which seriously impaired his judgment. Dr. Almer also found that Mr. Cook likely blacked out for many events during the weekend of the crime and that he lacked normal inhibition and was more impulsive.

73. On January 18, 1988, Dr. Almer wrote a letter to the court because of Mr. Cook's history of head injury and references to seizures. Dr. Almer recommended a neurological exam.

74. B. Anthony Dvorak, M.D., F.A.C.S, conducted a three-hour neurological exam of Mr. Cook, and issued a report via letter to attorney Claude Keller, dated February 13, 1988.

75. Dr. Dvorak referenced records indicating Mr. Cook was diagnosed with schizophrenia on September 4, 1983. He noted a diagnosis of acute psychosis on November 18, 1984, and a diagnosis of alcohol overdose on November 21, 1984. He also noted Mr. Cook had been prescribed the anticonvulsant, Dilantin in the past.

76. Dr. Dvorak noted a completely normal neurological exam, but noted a history of repeated head injuries. Dr. Dvorak recommended an EEG (electroencephalogram) and CAT scan of the brain. I have not been provided with records from this testing, and Mr. Cook's counsel informed me that there is no record of the results in the court record.

77. The presentence report dated August 8, 1988, states that Mr. Cook and his sister were sexually abused by their grandfather. It notes that Mr. Cook acknowledged the sexual abuse on his sister, but denied it happened to him. The report also states that Mr. Cook was in special education in elementary school.

78. It is common for people who have been sexually abused as children to have an inability to recall important aspects of trauma. Another consequence of experiencing abuse is that victims avoid thoughts and feelings associated with the trauma. These reactions are so prevalent that they are included in the diagnostic criteria for PTSD. Many other victims of sexual abuse are ashamed or fear consequences for disclosing abuse, such as a disruption of familial relationships or potential harm to loved ones. Mr. Cook, in particular, did not give me permission to disclose information regarding his mother's sexual abuse until the last interview I had with him. Substance abuse disorders are also a common complication of PTSD.

79. I am aware that Mr. Cook asked for a mental health expert to assist him in his capital sentencing proceedings. Evaluations conducted for the purpose of the sentencing phase of a capital trial are separate and distinguishable from pretrial evaluations conducted for the purpose of determining competency and criminal responsibility for the guilt phase of a trial. For example, in addition to providing diagnoses, an expert would provide education as to the etiology of these diagnoses and information about complications, prognosis, and treatment. An evaluation for a capital sentencing requires an extensive review of

records and ample time and opportunity to evaluate the defendant, especially in light of the difficulty victims of abuse experience in disclosure.

80. It is my professional opinion that, had Mr. Cook been allowed a proper mental health evaluation in preparation for sentencing, he would have been diagnosed with the following disorders at the time of the crime based on the Diagnostic and Statistic Manual of Mental Disorders (DSM-III-R).

- post-traumatic stress disorder (309.89);
- organic mental syndrome, not otherwise specified (294.80);
- borderline traits;
- amphetamine induced delusional disorder (292.11);
- amphetamine intoxication (305.70); and
- alcohol intoxication (303.00).

81. At the time of the crime, Mr. Cook had, and he continues to have, post-traumatic stress disorder (309.89). *See* DSM-III-R, pp.247-251. PTSD is an anxiety disorder. In order to meet the diagnostic criteria for PTSD, five criteria must be met.

82. The first criterion is that the person must have been exposed to a traumatic event that is outside the range of usual human experience and would be markedly distressing to almost anyone. The trauma may be experienced alone (such as rape or assault) or in the company of people. Mr. Cook was exposed to a number of qualifying events starting from the time he was an infant: he was burned on his penis with a cigarette by his father, he was sexually molested by his step-grandfather, he observed his step-grandfather molest his sister, he was sexually molested by his mother, he was sexually abused by Howard Bennett while at the McKinley Home, and he was sexually assaulted at the Greyhound bus station. Mr. Cook also was the victim of physical abuse. When he was a young boy, Mr. Cook was forced to eat his own vomit, was tied to chairs as punishment, and was beaten regularly with a belt.

83. The second criterion for PTSD involves persistently re-experiencing the traumatic event in at least one of the following ways: recurrent and intrusive thoughts; recurrent dreams of the event; feeling as if the

traumatic event is reoccurring; or intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event. Mr. Cook reports daily thoughts of the abuse he witnessed and experienced. He also admits to reacting quickly to noises. He states the smell of hominy reminds him of his step-grandfather. He does not like being hugged. He also reports that he would have flashbacks of prior sexual assault when he was with his girlfriend Barbara. He states he would have intrusive thoughts about his sexual experiences with his sister Debbie. Mr. Cook has recurrent intrusive thoughts of being handcuffed to the bed at the McKinley Home.

84. The third criterion for PTSD involves persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following: efforts to avoid thoughts or feelings associated with the trauma; efforts to avoid activities or places associated with the trauma; inability to recall important aspects of the trauma; markedly diminished interests in activities; feeling detached or estranged from others; restricted range of affect; and a sense of foreshortened future. Because Mr. Cook's traumatic abuse started at such an early age, there is no way to tell if a symptom was not present before the trauma. Also, Mr. Cook had numerous traumatic events, each of which individually could account for his symptoms. These traumatic events occurred over time. Mr. Cook meets this criterion because he avoids watching shows about child abuse. He feels detached from others and has always had few, if any, friends. He has difficulty trusting others. Mr. Cook also is unable to recall certain aspects of his abuse as a child. Mr. Cook does not like to be hugged.

85. The fourth criterion for PTSD involves persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following: difficulty sleeping; irritability or outbursts of anger; difficulty concentrating; hypervigilance; exaggerated startle response; or physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event. As explained above, because Mr. Cook's traumatic abuse started at such an early age, there is no way to tell if a symptom was not present before the trauma. As Dr. Almer stated in his report, Mr. Cook's history demonstrates general acting-out behavior, fights, and impulsivity,

indicating both hypervigilance and outburst of anger. He was diagnosed with an anxiety disorder (overanxious disorder of adolescence) while in treatment at the McKinley Home for Boys.

86. The fifth criterion for PTSD requires the duration of the above symptoms for more than a month. From all the reported history of Mr. Cook, these symptoms were not only present at the time of the crime, but were evident from the records as far back as McKinley Home, which predated the crime by ten years.

87. At the time of the crime, Mr. Cook had, and continues to have, organic mental syndrome, not otherwise specified (294.80). *See* DSM-III-R, pp.119. This diagnosis is made when there is 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, pp. 100. It is noteworthy that the DSM-III-R (p. 249) states: "There may be symptoms of an Organic Mental Disorder, such as failing memory, difficulty in concentrating, emotional lability, headache and vertigo" under the associated features of PTSD.

88. In Mr. 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.

89. Neuropsychological testing was completed by Dr. Tora Brawley on May 6, 2010. A report of those findings was issued September 30, 2010. Mr. Cook had deficits in verbal fluency, verbal learning, copy of a visual complex figure, and manual speed. Dr. Brawley found that Mr. Cook's frontal lobe dysfunction was present at the time of his offense. He also has other clinical symptoms associated with cognitive dysfunction including migraine headaches and self reports of memory loss. Dr. Dvorak also noted that Mr. Cook had been prescribed the anticonvulsant Dilantin® because of a history of seizures.

90. At the time of the crime, Mr. Cook had, and he continues to have, borderline traits. Borderline traits are the maladaptive traits that have

developed in Mr. Cook as a result of the physical and sexual abuse he experienced as a child. He has chronic impulsivity and suicidal ideation. Mr. Cook does not meet the criteria for the diagnosis of borderline personality disorder (301.82), *see* DSM-III-R, pp. 346-347, because he has four symptoms and five are needed for a diagnosis. Mr. Cook demonstrates impulsiveness that is potentially damaging through his substance abuse history and sexual impulsivity. Mr. Cook's history is replete with a history of attempted suicide and history of self-mutilation. Mr. Cook also had marked and persistent identity disturbance manifested by uncertainty in his sexual orientation and his self-image. Finally, Mr. Cook's history demonstrates frantic efforts to avoid abandonment from his mother. While he demonstrates these personality traits, the expression of these traits are dependent upon stressors which are not present on a daily basis.

91. At the time of the crime, Mr. Cook had amphetamine delusional disorder (292.11). *See* DSM-III-R, pp.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, and the behavior is not due to any physical or other mental disorder.

92. Mr. Cook had amphetamine delusional disorder at the time of the crime. Reports indicate that he was using crystal amphetamine at the time of the crime. Mr. Cook's co-defendant Matzke stated that Mr. Cook was telling the victim to take them to his leader. Mr. Cook accused the victim of being a spy. Matzke also reported that Mr. Cook was referring to Oliver North and the CIA, and that Mr. Cook kept asking Carlos about his leader in Nicaragua. Such statements were not reality based. They were persecutory in nature, which is a symptom of psychosis.

93. At the time of the crime, Mr. Cook had amphetamine intoxication (305.70). See DSM-III-R, pp.134-135. This diagnosis is consistent with the diagnosis provided by Dr. Wynkoop in his report. Mr. Cook reported that he was using crystal methamphetamine the weekend that the crime occurred, including on the day that Carlos and Kevin were killed. Matzke confirms that both he and Mr. Cook were using crystal

methamphetamine at least one day prior to the crime, and Matzke notes that Mr. Cook may have been using the day of the crime because he was in his bedroom with the door shut. Matzke reports that Mr. Cook went five days without sleep, which is symptomatic of a person on methamphetamine.

94. At the time of the crime, Mr. Cook had alcohol intoxication (300.00). *See* DSM-IIIR, pp.127-128. This diagnosis is consistent with the diagnosis provided by Dr. Wynkoop in his report. Features associated with alcohol intoxication include maladaptive behavioral changes such as disinhibtion of sexual and aggressive impulses, mood lability, impaired judgment, and impaired social or occupational functioning. Mr. Cook reports that he consumed at least 24 beers on the day of the crime. Matzke confirmed. Mr. Cook also had taken 40mg of Valium®, which would have intensified the effect of alcohol. Mr. Cook's underlying brain dysfunction also would have intensified the effect of alcohol.

95. These diagnoses were available at the time of the crime. All of the information presented in this declaration could have been presented at Mr. Cook's sentencing hearing had an expert been hired to conduct the necessary review of Mr. Cook's background and evaluations of Mr. Cook himself.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 21st day of November, 2010, in the State of South Carolina.

Donna Marie Schwartz-Watts, M.D.

EXHIBIT A TO
DECLARATION OF DONNA MARIE SCHWARTZ-WATTS, M.D.

Curriculum Vitae
DONNA MARIE SCHWARTZ-WATTS, M.D.

DATE OF BIRTH: May 29, 1963
PLACE OF BIRTH: Camp LeJeune, North Carolina

PRESENT POSITIONS:

Senior Psychiatrist (certified)
Bryan Psychiatric Hospital

DMH Clinical Professor of Psychiatry
University of South Carolina School of Medicine
Department of Neuropsychiatry and Behavioral Science

PROFESSIONAL LICENSURE:

Diplomate, Psychiatry, (Board Certification #40726), January 1995,recertified 7/05
Added Qualifications in Forensic Psychiatry, July 1996 #471, recertified 7/06
South Carolina Medical License # 16574

EDUCATION:

1981 - 1985	B.A. Psychology Furman University Greenville, South Carolina
1985 - 1989	Doctor of Medicine University of South Carolina School of Medicine Columbia, South Carolina

POSTGRADUATE FELLOWSHIPS AND RESIDENCY POSITIONS:

1989 - 1993 Resident in General Psychiatry
William S. Hall Psychiatric Institute
Columbia, South Carolina

1993 - 1994 Fellowship in Forensic Psychiatry
William S. Hall Psychiatric Institute
Columbia, South Carolina

ACADEMIC POSITIONS/EMPLOYMENT/UNIVERSITY APPOINTMENTS:

7/2006-7/2010
Professor of Clinical Psychiatry
Director, Forensic Psychiatry Services
University of South Carolina School of Medicine
Department of Neuropsychiatry and Behavioral Science
3555 Harden Street Extension, Suite 102
Columbia, South Carolina 29203
(803) 434-4698(803) 434-2367 (fax)

Consulting and Treating Forensic Psychiatrist
South Carolina Department of Juvenile Justice

Consulting and Treating Forensic Psychiatrist
South Carolina Department of Corrections

11/98-6/2009 Consulting and Treating Forensic Psychiatrist
Behavioral Disorders Treatment Program
(Sexually Violent Predator Program: SC 44-48-110)
South Carolina Department of Mental Health

6/1997- 7/2006 Associate Professor
Director, Forensic Services
Department of Neuropsychiatry
University of South Carolina School of Medicine

1/2004-7/2004 Acting Assistant Director, Psychiatry Residency Program
University of South Carolina School of Medicine
Department of Neuropsychiatry and Behavioral Science

7 /1996 – 6/1997 Psychiatrist C William S. Hall Psychiatric Institute
Residential Treatment Director of NGRI Unit

1/1995 – 6/1996 Teaching Psychiatrist II William S. Hall Psychiatric Institute
Out-patient Forensic Psychiatrist

1/1995 – 12/1997 Assistant Professor University of South Carolina School of Medicine
Department of Neuropsychiatry

7/1994 –6/1995	Instructor University of South Carolina School of Medicine Department of Neuropsychiatry
7/1994 – 12/1994	Teaching Psychiatrist I William S. Hall Psychiatric Institute In-patient and Out-patient Forensic Psychiatrist

MEDICAL STAFF APPOINTMENTS

Bryan Psychiatric Hospital (current)
South Carolina Department of Corrections (courtesy)
South Carolina Department of Juvenile Justice (inactive 7/2010)
William S. Hall Psychiatric Institute
Palmetto Health Richland Memorial Hospital (courtesy)
Palmetto Health Baptist Medical Center (courtesy)

UNIVERSITY/ MEDICAL STAFF COMMITTEES:

2007-2010	Member, Appointments and Promotions Committee
2002- 2009	Member, Alumni Committee, USC School of Medicine
1996- Present	Member, Residency Selection Committee
1995- Present	Member, Residency Training Committee
2002- 2003	Member, Search Committee, Chairman of Neuropsychiatry
2000-2001	Member, Committee on Women USC
1997	Member, Traditions Committee USCSM
1997	Member, Search Committee, Director Rehabilitation Counseling
1997	Physician Advisor, Environment of Care
1996	Member, Search Committee Chair of Department of Neuropsychiatry and Director of Hall Institute
1996	Member, Finance Committee, University Specialty Clinics
1994-1996	Member, Infection Control Committee
1993-1994	Member, Research Committee

HONORS AND AWARDS:

2007	Outstanding Female Physician Mentor Award
2004-2005	Outstanding Forensic Teaching Award Presented by the USC SOM Forensic Fellowship Training Program
1992	Rappeport Scholarship in Forensic Psychiatry Presented by the American Academy of Psychiatry and the Law
1989	Neurology Award, School of Medicine
1985	Cum Laude Graduate, Furman University Phi Beta Kappa, Furman University Alpha Epsilon Delta, Furman University

MEMBERSHIPS AND OFFICES IN PROFESSIONAL ORGANIZATIONS:

2002-2009	American Board of Psychiatry and Neurology Forensic Certification Committee

1999-Present American Board of Psychiatry and Neurology
1999-Present Board Examiner

1997-2003 Group for the Advancement of Psychiatry (GAP), General Member
1999 Chair

1992- Present American Academy of Psychiatry and the Law (AAPL)
1995-2000 Rappeport Committee (President appointed)
1995-2000 Education Committee (President appointed)
1998-2000 Program Committee (President appointed)
1999 Program Chair
1995-97 Mentor to Rappeport Fellow

1989-1998 American Psychiatric Association, General Member

1989-1998 South Carolina Psychiatric Association
1995-1998 Federal Legislative Representative (President appointed)
1995-1999 Executive Council
1996-1998 Secretary-Treasurer

1997 NAMI Advisory Board Physician Representative

PUBLICATIONS:

Schwartz-Watts DM: "Commentary: Stalking Risk Profile." The Journal of the American Academy of Psychiatry and the Law, 34:455-457, 2006.

Schwartz-Watts DM, Frierson RL: "20: Crisis Stabilization in Correctional Settings." in Clinical Practice in Correctional Medicine , Second Edition, edited by Michael Puisis, D.O., S.C. Mosby, Inc affiliate of Elsevier, Inc 2005.

Schwartz-Watts DM. "Asperger's Disorder and Murder." Analysis & Commentary The Journal of the American Academy of Psychiatry and the Law 33:390-3, 2005.

Schwartz-Watts DM, Rowell CN. "Commentary: Update on Assessing Risk for Violence Among Stalkers." The Journal of the American Academy of Psychiatry and the Law 31:440-3, 2003.

Giorgi-Guarnieri D, Zonana HV, Schwartz-Watts DM. "Practice Guideline: Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense." Supplement to The Journal of the American Academy of Psychiatry and the Law 30:2, 2002.

Frierson R, Schwartz-Watts D, Malone T, Morgan D. "Capital Versus Noncapital Murderers" in revision The Journal of the American Academy of Psychiatry and the Law, 1998.

Schwartz-Watts D, Morgan D. "Violent Versus Nonviolent Stalkers," accepted, The Journal of the

American Academy of Psychiatry and the Law, 1998.

Schwartz-Watts D, Morgan D, Barnes C. "Stalkers: The South Carolina Experience," The Journal of the American Academy of Psychiatry and the Law,1997, 24:541-545.

Schwartz-Watts D, Montgomery L, Morgan D. "Seroprevalence of Human Immunodeficiency Virus Among Pre-Trial Detainees," The Bulletin of the American Academy of Psychiatry and the Law, 1995, 23:285-289.

POSTERS:

Internet Chat Rooms: Who Solicits Children? R. Gregg Dwyer, MD, EdD, Donna Schwartz-Watts MD , William Burke, PhD, American Academy of Psychiatry and the Law 39th Annual Meeting, Seattle, WA October , 2008

PRESENTATIONS:

"Stalking in the New Millennium": Department of Mental Health Day Long CME, Columbia SC, October 2009

"Internet Predators": South Carolina Psychiatric Association Annual Meeting, Myrtle Beach, South Carolina, 1/2009

"Internet Predators": Panel Speaker, South Carolina Bar Association Annual Meeting, Myrtle Beach South Carolina, 1/2009

Internet Predators: ICAC Quarterly Meeting, Columbia, South Carolina 11/21/2008

Project Safe Childhood, Advanced Online Child Exploitation Seminar, National Advocacy Center Columbia, SC, July 29, 2008

"Violent Crimes and the Commitment of Sexually Violent Predators, MUSC Judges and Attorneys Substance Abuse and Ethics Seminar, Charleston, South Carolina, December 7, 2007

"Autistic Spectrum Disorders and Corrections" South Carolina Department of Corrections Mental Health Seminar, Columbia, South Carolina, December, 2007

"Pitfalls in Sex offender Commitment Hearings" Panel Speaker, American Academy of Psychiatry and the Law 38th Annual meeting, Miami, Florida, October 22, 2007

"Treating the Untreatable" Panel Speaker, American Academy of Psychiatry and the Law 38th Annual Meeting, Miami, Florida, October 19, 2007

"Risk Assessment in General Psychiatry: Department of Mental Health Annual Day Long CME, Columbia, SC September 21, 2007

"Mitigation in Noncapital Cases" SC Public Defender's Conference, Myrtle Beach, SC October 2007.

"Nuts and Bolts of Sexually Violent Predator Proceedings" SC Bar CLE, Columbia, South Carolina July 27, 2007

University of South Carolina School of Medicine Founder's Day Speaker for Woman in Medicine, Columbia, South Carolina, April 2007.

"Autistic Spectrum Disorders and Mitigation," Washington DC March 2007

"Sex Crimes and their Aftermath II" Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC, January 25, 2007

"Psychiatry for the Brilliant Fact Finders" Invited Speaker, South Carolina Judges Conference, Greenville, SC, May 12, 2006.

"Sex Crimes and their Aftermath" Panel Discussion and Presentation, Jack Swerling Moderator, South Carolina Bar Association Conference, Charleston, SC January 27, 2006.

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia , June 4-5, 2005

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, Atlanta Georgia , June 5-6, 2004

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice National Institute of Trial Advocacy, New York, New York, June 20-21,2003

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York. June 20-22,2002.

South Carolina Probation, Paroles and Pardons Annual Conference. "A State of Mind". Myrtle Beach, SC. November 11, 2002.

American Academy of Psychiatry and the Law, "Difficult Case? Consult your Colleagues." Newport Beach, California. October 26, 2002

South Carolina Public Defender's Conference, "Issues and Concerns Regarding the Sexually Violent Predator Statue" Litchfield Beach, South Carolina, September 30, 2002

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 28-30-2002.

American Academy of Psychiatry and the Law, "Death Penalty" Boston, MA, October 28, 2001

American Academy of Psychiatry and the Law, "Ask the Expert" and "The Difficult Case" Panel Discussions. Boston, MA, October 28, 2001

Habeas Institute, Guest Faculty Teaching for the Federal Defenders, US Department of Justice, New York, New York, June 14-17-2001.

Annual Capital Defense Training Seminar, "The Importance of Timing in the Presentation of Your Client's Story: Frontloading Mitigation" with John Blume, Attorney, Jekyll Island, Georgia, February 9, 2001

University of Texas, Department of Psychiatry Grand Rounds "Profile of a Stalker" San Antonio, Texas, December 19, 2000

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Death Penalty Evaluations," December 18, 2000.

Willford Hall Medical Center, Lackland Air Force Base, Texas, "Texas Sexually Violent Predator Statute," December 18, 2000

American Academy of Psychiatry and the Law, " Juveniles Who Carry Weapons on School Grounds" Baltimore, Maryland, October 15, 1999

American Academy of Forensic Science, Workshop Presenter, San Francisco, 1998 "Classification and Typology of Stalkers."

Kansas City, Western Missouri Forensic Department, 1997 "Evaluation of Stalking."

University of South Carolina School of Medicine Women's Month Featured Presenter, 1997 "Stalkers: The South Carolina Experience."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Psychotic versus Nonpsychotic Stalkers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 "Harassing Telephone Callers."

American Academy of Psychiatry and the Law, Denver, CO, 1997 Panel on Maintaining Competence sponsored by Education Committee

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Violent Versus Nonviolent Stalkers",

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Capital Versus Noncapital Murderers"

American Academy of Psychiatry and the Law, Puerto Rico, 1996 "Treatment of Insanity Acquittees Across the United States."

William S. Hall Psychiatric Institute Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

Georgia Regional Forensic Forum, 1996 "Evaluation and Treatment of Sexual Offenders."

American Academy of Psychiatry and the Law, Seattle, Washington, 1995 "Stalkers: The South Carolina Experience"

South Carolina Psychiatric Association, Hilton Head Symposium, 1995 "What General Psychiatrists Need to Know About Forensic Psychiatry."

American Academy of Psychiatry and the Law Annual Conference, San Antonio, Texas 1993 "Seroprevalence of HIV Among Inpatient Pre-trial Detainees"

American Medical Association, North Carolina 1990 "Tertiary Metastases Presenting As Panhypopituitarism"

Present Research:

Schwartz-Watts D. "Death Penalty"

Schwartz-Watts D, Barth E, Morgan D. "Harassing Telephone Callers"

Schwartz-Watts D, Morgan D. "Psychotic Versus Nonpsychotic Stalkers"

Schwartz-Watts D, Morgan D. "Comparing Stalkers to the Criminally Domestic Violent."

Schwartz-Watts D, Bloom J, Sloan C. "Psychiatric and Legal Perspectives of Stalking."

Present Grants:
Co-author w R. Gregg Dwyer et al Internet Predators

Co-author w Alicia Hall, PhD, Harry Wright, MD Autistic Spectrum Disorders and Corrections

(Revised 11/20/10)