

Application for Executive Clemency

Daniel Wayne Cook

ADC# 069007

HEARING SCHEDULED: AUGUST 3, 2012

Jon M. Sands
Federal Public Defender
Robin C. Konrad
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, AZ 85007
Telephone: 602.382.2816
robin_konrad@fd.org

Michael J. Meehan
3938 E. Grant Rd. No. 423
Tucson, Arizona 85712
Telephone: 520.529.1969
Mmeehan.az@msn.com

Respectfully Submitted
July 27, 2012

Background Regarding the Offense

Petitioner: Daniel Wayne Cook

Date/Place of Crime: July 19-20, 1987, in Lake Havasu, Arizona

County: Mohave

Victims: Carlos Froylan Cruz-Ramos (age 26)
Kevin Swaney (age 16)

Codefendant: John Matzke, served 20 years; released on July 16, 2007

Indictment: 2 counts of first-degree murder

Convictions: 2 counts of first-degree murder, convicted on July 6, 1988

Sentence: Sentenced to death on both counts of murder on August 8, 1988. Aggravating circumstance of pecuniary gain applies to Carlos; aggravating circumstance of cruel, heinous, or depraved applies to both Carlos and Kevin; aggravating circumstance that one or more homicides occurred applies to both Carlos and Kevin; no mitigating factors found.

Admitted to ADOC: August 23, 1988

Age at Admission: 27

Current Age: 51

Date of Birth: July 23, 1961

Judge: Steven Conn

Prosecuting Attorney: Eric Larsen

Defense Attorney: Claude Keller

Introduction

Daniel Cook and his codefendant John Matzke killed Carlos Froylan Cruz-Ramos, a man from Guatemala who came to the United States to find a better life, and Kevin Swaney, a sixteen-year-old runaway who had been adopted a few years earlier by the Swaney family. Dan was convicted of two counts of first-degree murder in Mohave County in 1988, and was sentenced to death. Matzke pled guilty to second-degree murder and served twenty years in prison; he has been living in Tucson since 2007. Dan is scheduled to be executed on August 8, 2012.

Dan is a seriously mentally ill individual because, in part, he endured a childhood replete with sexual and physical abuse.¹ Dan's continual traumatic abuse caused him to develop Post Traumatic Stress Disorder (PTSD).² Dan has daily thoughts and flashbacks about the trauma he endured. He exhibits typical symptoms of PTSD including hypervigilance and impulsivity.³ Dan has descended into multiple substance addictions, a common complication of PTSD.⁴

Dan also has a significant history of impairments in cognitive functioning,

¹Declaration of Donna Schwartz-Watts, M.D., attached as Ex. 10, ¶¶ 18, 19, 21, 26, 27, 30, 31.

²See Ex. 10 ¶¶ 81-86. Donna Schwartz-Watts, M.D., a psychiatrist with a background in evaluating and treating people with sexual abuse, conducted an extensive review of Dan's history, evaluated him several times in 2010, met with his mother, and consulted with neuropsychologist Tora Brawley, Ph.D., in reaching these diagnoses. See Ex. 10 ¶¶ 6, 8, 10, 12, 18, 19, 21, 26, 27, 30, 31.

³Ex. 10 ¶ 85.

⁴Ex. 10 ¶ 78.

including being in special education classes as a child and having seizures as a young adult, that is evidenced by his neuropsychological testing.⁵ Causes for his cognitive impairments include being exposed to alcohol *in utero*, being born three months prematurely, being physically abused as an infant, sustaining head injuries (including being run over by a car), and abusing substances and overdosing on medications.⁶ The result is that Dan has been diagnosed with organic mental syndrome, not otherwise specified.⁷ In layman's terms, Dan has brain damage.

Dan suffers from clinical symptoms associated with brain damage, such as migraines and memory loss, and has been medicated for seizures.⁸ Dan's brain damage is in the frontal lobe part of his brain and was present at the time of the crime. Frontal lobe dysfunction, combined with the use of drugs and alcohol, very likely rendered him more susceptible to poor judgment and impulsivity at the time of his crime, and contributed to the circumstances of his crime.⁹

We know that if the information about Dan's mental illness and his childhood

⁵Ex. 10 ¶¶ 75, 77; Letter from Tora Brawley, Ph.D. to Robin Konrad, dated Sept. 30, 2010, attached as Ex. 11, at 3 (noting that Dr. Wynkoop's test results demonstrated indicators of frontal lobe dysfunction).

⁶Ex. 10 ¶¶ 15, 16, 37-40, 46, 47, 49, 57, 58, 62, 73.

⁷Ex. 10 ¶¶ 87-89; Ex. 11 at 3-4.

⁸Ex. 10 ¶ 89.

⁹Ex. 11 at 4.

abuse been developed and presented to the prosecutor, it would have spared Dan's life because the prosecutor would not have sought the death penalty.¹⁰ Sadly, this never happened. Dan was allowed to represent himself, and the trial court denied his request for expert assistance at his sentencing. The prosecutor cannot change the past. This Board, however, is bound by no such restrictions and has the power to set things right.

Dan's serious mental illness does not excuse Dan's conduct or the tremendous loss his actions caused to the victims' families, but does offer a context to understand his actions. "PTSD affects the way you see, think about, and respond to people and situations."¹¹ Dan's illness affects his understanding of reality, his perception of surroundings, and his reactions to otherwise normal events—his understanding of the world and the events that transpire are different from ours *every day*.¹²

Coupled with his brain damage and excessive abuse of drugs and alcohol, the trauma of Dan's life played out in this offense. The horrors that Dan suffered were the same horrors that Kevin and Carlos suffered. Dan's grandparents tied him to chairs as punishment; he was repeatedly raped as a child; his father burned his genitals with cigarettes; his sexual abuser had him circumcised as a teenager; and he was beaten with

¹⁰Declaration of Eric Larsen, attached as Ex. 1, ¶ 9.

¹¹Veterans Benefits Information, Criminal Behavior and PTSD, Dec. 13, 2011, *available at* <http://www.veteransbenefitsinformation.com/ptsd/3526-criminal-behavior-and-ptsd.html> (last visited July 27, 2012).

¹²*See Davidson, Michael J., Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415, 422 (1988).

belts, boards, and fists. Each of these acts was done to one or both of the victims.

The crime that Dan committed was uncharacteristic of him as a person. Contrary to the presentence report, Dan has not displayed this type of violence toward others before or after the crime.¹³ The people who knew Dan both before the crime and after the crime describe him as a caring and good-natured person who is a follower and who wants to be accepted by others.¹⁴ His uncharacteristic violent acts were a result of a combination of things: Dan had stopped taking his medication because of its side effects only months earlier and he began using extremely toxic mixtures of drugs; he lost his relationship with a woman who he finally thought loved and accepted him; he lost his job; and he was aided by a person he considered a good friend, even though he had known him less than a month. These factors created the perfect storm, which resulted in Dan committing violent acts against others.

Dan asks this Board to recommend that Governor Jan Brewer commute his death

¹³Declaration of Thomas Maas, attached as Ex. 39, ¶ 5 (“Dan did not have violent tendencies toward others; he only hurt himself.”); Declaration of Jack Donohue, attached as Ex. 40, ¶ 10 (“As a child, Danny was not violent.”); Declaration of Lydia Lagunas, attached as Ex. 9, ¶ 2 (“Dan did not cause problems and got along with everyone”); Declaration of Gabriel Lagunas, attached as Ex. 7, ¶ 2 (Dan did not harm the Sergeant despite having an opportunity to do so).

¹⁴Ex. 39 ¶ 4 (“He was loving, caring, and kind.”); Ex. 39 ¶ 13 (“Dan was a follower.”); Ex. 40 ¶ 22 (“he was always a follower”); Declaration of Patricia Rose, attached as Ex. 41, ¶ 2 (“Dan was a follower and had a warped, misguided sense of loyalty to others.”); Ex. 41 ¶ 8 (“He was highly influenced by the people he hung out with and wanted to be accepted.”); Letter to Clemency Board from Elizabeth McOwat, attached as Ex. 56, at 1 (Dan has a “compassionate and caring nature”); Ex. 9 ¶ 6. (“Dan is a good person, especially his heart.”); Letter to Clemency Board from Margaret Hayes, attached as Ex. 59 (Dan “was definitely a follower and not a leader”).

sentence to life imprisonment without the possibility of parole. Ariz. Rev. Stat. § 31-402. In the alternative, Dan asks this Board to recommend that Governor Brewer issue a reprieve to allow the courts to fully consider and review the pending litigation. Ariz. Rev. Stat. § 31-402.¹⁵

Dan's Childhood

*"Dan was dealt a rotten hand in life."¹⁶
– Kathy Dunn, Dan's stepsister*

No human being should ever be subjected to the horrific abuse that occurred on July 19-20, 1987. And no human being should ever be subjected to the horrific abuse that Daniel Cook endured for his entire childhood and adolescence.

Dan's mother, Wanda, is a cold, callous woman. She is a "predator and sex abuser,"¹⁷ a "prescription pill junkie,"¹⁸ and she is mentally ill.¹⁹ A counselor remarked that he had "never talked to a colder, more heartless person in his many years of social work."²⁰ As recently as 2010, Wanda has expressed a desire to harm others.²¹ Wanda

¹⁵Dan's counsel will present the reasons for a reprieve at the clemency hearing scheduled for August 3, 2012.

¹⁶Declaration of Kathy Lynn Dunn, attached as Ex. 35, ¶ 3.

¹⁷Ex. 35 ¶ 4.

¹⁸Declaration of Debrah Howard, attached as Ex. 28, ¶ 5.

¹⁹Declaration of Wanda Dunn, attached as Ex. 29, ¶ 17; Ex. 28 ¶ 5; Ex. 35 ¶ 4.

²⁰Wyoming State Hospital Records, 1980-81, attached as Ex. 18, at p. 176.

²¹See Wanda Dunn Prime Care Hospice Records, attached as Ex. 30, at 374.

failed to provide her son with even the most basic needs. Instead of protecting and nurturing Dan, Wanda sexually molested him, beat him, and repeatedly abandoned him.

In 1959, in Chicago, Illinois, Wanda Meadows, age seventeen, married a drug addict and alcoholic named Gordon Cook.²² Gordon was no good to anyone and lived a “wicked life.”²³ In August 1960, Wanda and Gordon had a daughter named Debrah.²⁴ Less than a year later, Wanda gave birth to Dan.²⁵

Dan’s abuse from his parents began *in utero*. Gordon beat Wanda while she was pregnant; he punched Wanda in the belly and pushed her down, causing her to land on her stomach.²⁶ Additionally, Wanda, while pregnant, smoked daily, drank beer, and was too poor to eat properly or see a doctor.²⁷ As a result of this improper prenatal care, Dan was born three months premature in a Chicago hospital on July 23, 1961.²⁸ Dan’s life went downhill from there.²⁹

As an infant, Dan was in the hands of his merciless parents. Dan was not safe,

²²Ex. 29 ¶ 4; Marriage Certificate of Wanda Meadows and Gordon Cook, attached as Ex. 33.

²³Declaration of James Stone, attached as Ex. 34, ¶¶ 4-5.

²⁴Ex. 29 ¶ 4.

²⁵Ex. 29 ¶ 8.

²⁶Ex. 29 ¶ 6.

²⁷Ex. 29 ¶ 6.

²⁸Ex. 29 ¶ 8.

²⁹Ex. 29 ¶ 8.

even as a baby, from unthinkable abuse: his father Gordon beat him and Debrah with a belt and burned them.³⁰ When Dan was only five months old, Gordon burnt Dan's penis with cigarettes.³¹

After a period of homelessness, Wanda left Gordon, and the two eventually divorced. In her first act of abandonment, Wanda gave Dan and his older sister Debrah to their grandmother Mae and step-grandfather James Hodges when they were small children, even though Wanda knew James was a physically and sexually abusive "horrible man."³² Soon after, their step-grandfather began sexually abusing Dan and Debrah.³³ He forced them to engage in sexual acts with each other at very young ages,³⁴ and took pornographic pictures of Dan and his sister in sexual positions on the family's living room floor. As just a little boy, Dan witnessed his sister being raped by their grandfather and would hear Debrah crying in bed.³⁵ The sexual abuse, however, was not the only abuse Dan's grandparents inflicted upon him.

Dan and his sister also suffered physical abuse and neglect from their

³⁰Ex. 29 ¶ 9.

³¹Ex. 29 ¶ 9.

³²Ex. 29 ¶¶ 3, 10; Ex. 28 ¶ 6, 8.

³³Ex. 28 ¶ 8; Ex. 10 ¶ 18.

³⁴Ex. 29 ¶ 10; Ex. 10 ¶ 18.

³⁵Ex. 10 ¶ 18; Ex. 29 ¶ 10; Ex. 28 ¶ 8.

grandparents. As punishment, Dan and his sister would be tied to chairs.³⁶ The grandparents also failed to properly feed the children, often giving them things like a single piece of pie for dinner.³⁷ Once, Dan got sick from eating, and his grandparents forced him to eat his own vomit off the ground.³⁸ The grandparents also dragged the young children in and out of bars, while they got drunk.³⁹

Wanda's decision to send her young children to live with their sexual predator step-grandfather was not the worst act she committed when Dan was a young boy. Wanda herself sexually violated Dan. She would beat Dan and then fondle his penis in what Dan describes as a way to "make him feel better."⁴⁰ She also napped with Dan, and when he would awake, he was naked and his mother was inappropriately touching him.⁴¹

When Dan was five, Wanda remarried.⁴² Her new husband, John Dunn, was a man twenty-three years older than she, who had many children from several different relationships.⁴³ Wanda and her new husband also had a baby together, Dan's younger

³⁶Ex. 29 ¶ 10; Ex. 10 ¶ 19.

³⁷Ex. 28 ¶ 7.

³⁸Ex. 28 ¶ 7.

³⁹Ex. 28 ¶ 7.

⁴⁰Ex. 10 ¶ 21.

⁴¹Ex. 10 ¶ 21.

⁴²Ex. 28 ¶ 13; Marriage Certificate of Wanda Cook and John Dunn, attached as Ex. 32.

⁴³Ex. 28 ¶ 9; Ex. 29 ¶ 13; Letter from Patricia Golembieski, attached as Ex. 36.

brother George. John Dunn was controlling and abusive.⁴⁴ Wanda moved to California with her new family, and left Dan and his sister behind in Chicago with their abusive grandparents.⁴⁵ When Dan was nine, his grandmother Mae died. Dan and his sister were sent to California to live with Wanda and her new family.⁴⁶

Escaping his monstrous grandparents did little to improve life for Dan. Their stepfather believed Dan and Debrah “had bad genes or were from bad seed.”⁴⁷ Instead of being welcomed into their new family, Dan and Debrah were treated as outcasts.⁴⁸ Dan’s stepfather, joined by Wanda, beat Dan and yelled at him regularly.⁴⁹ Dan’s sister remembers a time when Dan was getting beaten with a belt and Dan grabbed onto the belt for dear life, while he flew back and forth in the air.⁵⁰ Dan’s stepfather also beat the children with what he called “The Board of Education.”⁵¹ He would make the children drop their trousers and bend over, and then he beat them with the board.⁵²

⁴⁴Ex. 35 ¶ 6.

⁴⁵Ex. 29 ¶ 13.

⁴⁶Ex. 10 ¶ 22; Ex. 28 ¶ 9.

⁴⁷Ex. 36.

⁴⁸Ex. 36; Ex. 28 ¶ 10; Ex. 29 ¶ 13.

⁴⁹Ex. 28 ¶¶ 10, 13; Ex. 29 ¶ 13.

⁵⁰Ex. 28 ¶ 13.

⁵¹Ex. 35 ¶ 6.

⁵²Ex. 35 ¶ 6.

Continuing the tragic pattern of Dan's early life, sexual abuse pervaded his newly-blended home as well; there were no boundaries in this family.⁵³ As Dan's sister described, "[w]ith the prevalence of sexual abuse in the family home, it was confusing."⁵⁴ On several occasions, Dan's older stepbrother forced Dan to give him oral sex and he molested Dan's younger brother George.⁵⁵ Wanda sexually abused one of her stepsons.⁵⁶ Dan's sister and stepsister were molested by their stepbrothers.⁵⁷ Dan's stepfather even suggested that his own daughter have sex with him, an offer which she declined.⁵⁸

Dan's "home" between ages nine to fourteen was also emotionally abusive because of Wanda's mental illnesses. Wanda suffers from bipolar disorder, depression, anxiety, and schizo-affective disorder.⁵⁹ While Dan was growing up, she attempted suicide on numerous occasions.⁶⁰ Once, when Wanda attempted to overdose on pills, she made Dan sit next to her bed; she told him she wanted him to watch her die. After

⁵³Ex. 10 ¶ 27; Ex. 28 ¶ 17.

⁵⁴Ex. 28 ¶ 17.

⁵⁵Ex. 10 ¶ 27.

⁵⁶Ex. 35 ¶ 5.

⁵⁷Ex. 28 ¶ 17.

⁵⁸Ex. 36.

⁵⁹Ex. 28 ¶ 5; Ex. 29 ¶ 17; Ex. 30 at 20; Ex. 35 ¶ 4; Declaration of Cynthia Kline, attached as Ex. 37, ¶ 5; .

⁶⁰Ex. 10 ¶ 28; Ex. 28 ¶ 11.

Wanda's suicide attempts, Dan's stepfather would blame Dan and his sister, telling them it was their fault that their mother wanted to kill herself.⁶¹ Like Wanda, Dan began to experience mood swings when he was a teenager.⁶²

Even though he had ongoing hardships, Dan managed to find a friend to stand by his side when things were tough. Jack Donohue became Dan's childhood friend when they were in the fourth grade.⁶³ Dan and Jack developed a close friendship and were in the Boy Scouts together.⁶⁴ Even as a boy, Jack knew that Dan was neglected.⁶⁵ Jack "despised Wanda because of how she treated Danny."⁶⁶ Feeling bad about Dan's awful home life, Jack often had Dan over to his house.⁶⁷ Jack's mother, Barbara Williamson, treated Dan like her own, often feeding him dinner and allowing Dan to join on family outings.⁶⁸

Despite all the abuse, all Dan ever wanted was his mother's love and attention.⁶⁹

⁶¹Ex. 10 ¶ 28; Ex. 28 ¶ 11.

⁶²Ex. 28 ¶ 14; Ex. 29 ¶ 13.

⁶³Ex. 40 ¶¶ 2-3.

⁶⁴Ex. 40 ¶ 9.

⁶⁵Ex. 40 ¶ 4.

⁶⁶Ex. 40 ¶ 5.

⁶⁷Ex. 40 ¶ 8.

⁶⁸Ex. 40 ¶ 8.

⁶⁹Ex. 28 ¶¶ 3, 10; Ex. 40 ¶ 20.

But, instead, when he was not quite fifteen, Dan’s mother gave custody of Dan to the State of California.⁷⁰ Wanda kept her younger son George. Wanda now claims she does not remember the “exact reason” she decided to give her son away.⁷¹ Dan, however, remembers crying and saying his final goodbye to his mother when he got in “the car that would take [him] on [his] final journey to hell.”⁷² He spent the remainder of his teenage years bouncing from one foster home to another, always craving his mother’s attention and always wanting to be part of a family. Just like Dan’s mother and the rest of his family, the State of California also failed to protect Dan from harm.⁷³

Dan’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.⁷⁴ While there, Dan was raped and violated by Howard Bennett, Jr., a house parent who has since been convicted of multiple acts of child sex abuse.⁷⁵ Bennett used his position of trust to develop a “big

⁷⁰Ex. 29 ¶ 14; McKinley Children Center Records, 1976-77, attached as Ex. 23.

⁷¹Ex. 29 ¶ 14.

⁷²Dan’s Life in Placement, written 1978, attached as Ex. 24.

⁷³Ex. 37 ¶ 7.

⁷⁴Ex. 23. Despite repeated efforts on Dan’s behalf to obtain his juvenile records, he recently learned that his juvenile records are missing and are no longer available. *See* Affidavit of Custodian of Record LA County, attached as Ex. 26.

⁷⁵Bennett 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* “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. 21; *California v. Bennett*, State of California Department of Justice, *Megan’s*

brother” type of relationship with Dan, plying young Dan with cigarettes.⁷⁶ Bennett took advantage of Dan’s vulnerability and trust for his own sexual gratification. Bennett reports: “I invited Dan into my room for a cigarette and began to touch him.”⁷⁷ Bennett admits to masturbating Dan and having him perform oral sex.⁷⁸

At McKinley, there was a “peek-a-boo room” which was used for “time outs.”⁷⁹ This room had a one-way mirror and Dan, along with other boys, would be subjected to abuse while adults watched from the other side.⁸⁰ Dan was forced to spend time in the “peek-a-boo room,” naked and handcuffed to the bed, while Bennet would rape him.⁸¹ Dan was even circumcised at age fifteen,⁸² at the instruction of Bennett.⁸³

In addition to being sexually abused by a house parent, Dan was gang raped by several of the boys at McKinley.⁸⁴ These boys were “Bennett’s enforcers,” and they

Law Homepage, Photograph of Howard Bennett, collectively attached as Ex. 22.

⁷⁶Declaration of Howard Smith Bennett, attached as Ex. 20, ¶ 5.

⁷⁷Ex. 20 ¶ 6.

⁷⁸Ex. 20 ¶ 6.

⁷⁹Declaration of David Overholt, attached as Ex. 25.

⁸⁰The administrator during Dan’s time at McKinley was dismissed after allegations regarding sexual misconduct arose.

⁸¹Ex. 10 ¶ 30.

⁸²Ex. 23.

⁸³Ex. 10 ¶ 32.

⁸⁴Ex. 10 ¶ 31.

would hogtie and then rape Dan when he would not submit to Bennett’s sexual assaults.⁸⁵ Attempting to escape the incredible, ongoing abuse, Dan ran away from McKinley on several occasions.⁸⁶ While on the streets, Dan resorted to prostitution to survive. Life on the streets was hard and dangerous—during that time, Dan was raped and threatened at gunpoint.⁸⁷ It was during Dan’s time at McKinley and on the streets that he began using drugs and alcohol.⁸⁸

At McKinley, Dan also experienced ongoing rejection by his mother and family. It was apparent to a counselor that Dan’s behavior problems were “directly correlated to his family.”⁸⁹ Dan’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.⁹⁰ Without telling Dan, Wanda even left California and moved to Lake Havasu, Arizona.⁹¹ Dan first learned that his family had moved when he was put on a bus to Lake Havasu for a family holiday. Dan wrote about how his mother’s repeated rejection and

⁸⁵Ex. 10 ¶ 31.

⁸⁶Ex. 23.

⁸⁷Ex. 10 ¶ 31.

⁸⁸Report of Eugene R. Almer, M.D., 1987, attached as Ex. 12, at 2. By age fourteen, Dan was drinking heavily, and by age seventeen, he was using marijuana, barbiturates, and hallucinogens.

⁸⁹Ex. 23.

⁹⁰Ex. 23.

⁹¹Ex. 23.

abandonment deeply affected him.⁹² In his poem titled “I Remember,” Dan wrote, “I also remember many nights talking with my mother on the phone and asking if I could return home . . . I remember the answers she gave me, they always made me cry.”

When Dan was eventually discharged from McKinley, his counselor noted that Dan was “sensitive and creative,” and enjoyed poetry and photography.⁹³ Despite the years of sexual assault and abuse he endured while at the facility, the discharge notes also indicate that Dan could be “pleasant, cooperative and helpful.”⁹⁴ Even though he had positive attributes, Dan was never provided with the tools or the environment to excel as a child or become a functional adult.⁹⁵ He constantly sought love and guidance but was met with extraordinary abuse and violation by almost every adult in his life.

After leaving McKinley at age sixteen, Dan spent his last two years as a child bouncing from group home to group home.⁹⁶ Dan spent the latter part of his childhood with Westside Youth Home parents Lisa and Tom Maas, who finally seemed to break

⁹²Selected Poetry from 1981, attached as Ex. 42.

⁹³Ex. 23.

⁹⁴Ex. 23.

⁹⁵Ex. 37.

⁹⁶School records indicate that Dan lived with one group parent named Arlis Benton (now deceased) and another named Margaret Hayes. School Records, 1977-79, attached as Ex. 27. Because the State of California lost his records, the number of other facilities in which Dan resided is unclear. Ex. 26. Mr. Benton is now deceased, but Ms. Hayes submitted a letter to this Board on Dan’s behalf. Letter to the Clemency Board from Margaret Hayes, attached as Ex. 59.

the cycle of abuse.⁹⁷ Tom Maas, who has fostered over fifty children, says that Dan was one of his “top kids” and describes Dan as “loving, caring and kind.”⁹⁸ Lisa Maas loved Dan very much and knew that his childhood was “a nightmare.”⁹⁹ He had a dry sense of humor, and loved nature and photography.¹⁰⁰ Dan excelled in the structured environment of the group home.¹⁰¹ Although Dan could function in a structured environment, as a child with severe symptoms and psychological issues resulting from childhood trauma, Dan’s social worker recognized that he needed “a higher level of care” than what he was provided.¹⁰²

While living with the Maas family, Dan received a camera for Christmas.¹⁰³ When he opened it, he broke down in tears.¹⁰⁴ Tom knew that this reaction came from a deep place of emotions.¹⁰⁵ Dan’s social worker found Dan to have disproportionate

⁹⁷Ex. 10 ¶ 36.

⁹⁸Ex. 39 ¶ 4.

⁹⁹Letter to the Clemency Board from Lisa Maas, attached as Ex. 38.

¹⁰⁰Ex. 39 ¶ 5.

¹⁰¹Ex. 39 ¶ 4.

¹⁰²Ex. 37 ¶ 7.

¹⁰³Ex. 39 ¶ 7.

¹⁰⁴Ex. 39 ¶ 7.

¹⁰⁵Ex. 39 ¶ 7.

emotional responses.¹⁰⁶ One time when Dan was really upset, he broke his own thumb.¹⁰⁷ This was not an isolated incident. As a child who suffered so much abuse, self-mutilation became a coping mechanism.¹⁰⁸ He would frequently cut himself with a razor or harm himself in other ways, such as breaking his thumb or starving himself.¹⁰⁹ His infliction of physical pain upon himself was a way to avoid the emotional pain he suffered.

Dan's social worker also reported that Dan's "mother was mentally unstable. . . . When Dan had a home visit, he returned to the group home very upset because the visit did not go well."¹¹⁰ Tom Maas found it unusual that he never met Dan's parents; no one ever visited Dan.¹¹¹ Because of his mother's inability to love and protect him, Dan was "lost, needy, and always wanted to belong."¹¹² He clung to Tom Maas and attempted to find a family with anyone who was willing to accept him.¹¹³

In 1979, just before turning eighteen, Dan left California for Lake Havasu in yet

¹⁰⁶Ex. 37 ¶ 3.

¹⁰⁷Ex. 37 ¶ 3; Ex. 39 ¶ 11.

¹⁰⁸Ex. 39 ¶ 6; Ex. 40 ¶ 18; Ex. 28 ¶ 14.

¹⁰⁹Ex. 10 ¶ 33.

¹¹⁰Ex. 37 ¶ 5.

¹¹¹Ex. 39 ¶ 8.

¹¹²Ex. 39 ¶ 9.

¹¹³Ex. 39 ¶¶ 9-10.

another attempt to be reunited with his mother. Wanda, however, did not want him and sent her son to live with another family. Dan moved to Idaho and stayed with his childhood friend Jack Donahue and Jack's mother, Barbara Williamson.¹¹⁴ Dan began adulthood with no real foundation or coping skills upon which to build a normal life.

Survival As an Adult

*Dan was a "broken individual."*¹¹⁵

– Patricia Rose, Dan's friend

Trying to make something of his life, Dan enlisted in the Army Reserves¹¹⁶ but only served from December 1979 until March 1980. As is often the case with severely abused and neglected children, Dan coped in this world by continuing his addiction to alcohol and drugs. During his brief time in the Army Reserves, he struggled with his alcohol addiction and attempted suicide.¹¹⁷ As a result, the Army honorably discharged Dan,¹¹⁸ reporting that he lacked the ability "to adjust to the stress of military life, as evidenced by [his] [] self-inflicted injury."¹¹⁹ As became Dan's pattern, when he was upset or encountered a stressful situation, he would harm himself.

¹¹⁴Ex. 10 ¶ 37; Ex. 40 ¶¶ 12-13.

¹¹⁵Ex. 41 ¶ 2.

¹¹⁶Army Records, 1979-80, attached as Ex. 19.

¹¹⁷Ex. 19.

¹¹⁸Ex. 19.

¹¹⁹Ex. 19.

Dan returned to Idaho in the spring of 1980, but still had difficulty adjusting. He continued to battle alcoholism and drug addiction. He, like his mother, was suicidal and was hospitalized several times for attempting to end his life.¹²⁰ Dan's friend Jack once talked Dan out of "jumping out of the car" he was driving, and then took Dan to the county hospital.¹²¹ Within a year, Dan moved and was living in Wyoming, where he again attempted suicide.¹²² He was treated at the Wyoming State Hospital for depression and alcoholism. Although no longer subjecting Dan to sexual abuse, Wanda continued to affect Dan's mental state through her continual rejection. Dan was at the mental hospital because he was depressed from "reading some rejecting letters from his mother."¹²³ A mental health counselor noted, "He needs her love and is always willing to give it one more try, although he knows it will result in pain."¹²⁴ 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. Dan placed a loaded shotgun against his throat but could not reach the trigger. This attempt was the result of Dan feeling rejected, as it was

¹²⁰Wyoming State Hospital Records, attached as Ex. 18; Idaho State Hospital Records, 1981-82, attached as Ex. 17; Ex. 40 ¶ 17.

¹²¹Ex. 40 ¶ 17.

¹²²Ex. 18.

¹²³Ex. 18.

¹²⁴Ex. 18..

only a few days after his relationship with a girlfriend ended.¹²⁵ 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.”¹²⁶

At the county hospital, the staff explained Dan: “he had many ups and downs, having periods where he functioned quite high and adequately, and then having periods where he was very impulsive, acted without thinking.”¹²⁷ Dan “relied very heavily on friends and the approval of friends and much of the time their decision ruled over much to his detriment.”¹²⁸ On a quest to be loved, Dan became involved with a hospital staff member and eventually left the hospital against professional advice.¹²⁹ Unable to cope, he voluntarily reentered the state hospital only a few days later, after yet another attempted suicide by overdosing on pills.¹³⁰ At the end of March 1983, after having been in the hospital for only one week, Dan left.¹³¹

Dan, now age twenty-one, returned to Lake Havasu, still seeking his mother’s

¹²⁵Ex. 17.

¹²⁶Ex. 17 at 9.

¹²⁷Ex. 17.

¹²⁸Ex. 17.

¹²⁹Ex. 17.

¹³⁰Ex. 17.

¹³¹Ex. 17.

attention. Again, Dan was rejected by Wanda; he was not allowed into her home.¹³² His capacity to endure his mother's rejection did not improve. Dan lived as a transient in Mohave County. One of Dan's friends, Patti Rose, said Dan was a "big time alcoholic," and when he drank, he simply "melted into the scenery."¹³³

Between 1983 and 1987, Dan was regularly seen by mental health professionals at the state hospital for various reasons, including depression, alcoholism, and acute psychosis.¹³⁴ Acute psychosis causes a temporary altered sense of reality; a person's brain will misperceive others' behaviors and interpret them in an irrational way. During this time, Dan also was arrested on several occasions for disorderly conduct and, as a result, spent time in jail.

Because of his mental health issues, Dan had a hard time keeping a job.¹³⁵ Once, Patti saw Dan living under a bridge, filthy and hungry.¹³⁶ She describes Dan as "a beaten, broken individual—it was as if you took the spirit out of a dog."¹³⁷ Dan lived a

¹³²Ex. 41 ¶ 4.

¹³³Ex. 41 ¶ 5.

¹³⁴Report of Eugene R. Almer, M.D., 1987, attached as Ex. 12, at 6; Report of B. Anthony Dvorak, M.D., F.A.C.S., 1987, attached as Ex. 13, at 1.

¹³⁵Ex. 41 ¶ 6.

¹³⁶Ex. 41 ¶ 7.

¹³⁷Ex. 41 ¶ 2.

very sad life.¹³⁸ Despite Dan’s attempts to be productive in society, he was not equipped with basic skills most people learn as children, so Dan failed each time he tried.

In 1986, Dan began a relationship with a woman named Barbara and her two children. Dan started to feel as if he was part of a family, with a semblance of stability and hope. His relationship with Barbara lasted more than a year—the longest relationship he had. Dan’s new family was supposed to move from Kingman to Lake Havasu on July 23—Dan’s birthday. Unfortunately for Dan, the relationship with Barbara came to an end before that happened. Around the same time, Dan had recently stopped taking his anti-anxiety medication because of the side effects. Dan’s problems were ultimately too much for Barbara, and instead of moving to Lake Havasu she moved in with another man.¹³⁹ Longing for Barbara, Dan counted the days since their break up on his calendar.¹⁴⁰

In June 1987, Dan allowed coworker John Matzke to live with him even though he had just met John. After a few weeks, Dan and John decided to move into a two bedroom apartment, which served as a “party place” for people to come drink and do drugs. As mid-July neared, Dan became depressed thinking about how Barbara and the kids were supposed to move in with him on July 23. Once again, Dan spiraled into a

¹³⁸Ex. 41 ¶ 8.

¹³⁹Ex. 12 at 4.

¹⁴⁰Dan’s Calendar 1987, attached as Ex. 43.

depression and numbed his pain in the only way he knew how—with drugs and alcohol. On Friday, July 17, the weekend of this crime, Dan quit his job in a moment of anger and despair because his boss told him “not to bring his personal problems to work.”¹⁴¹

After quitting his job, Dan went home to the apartment he shared with John and their newest roommate Carlos Froylan Cruz-Ramos. Feeling hopeless, Dan turned to alcohol, methamphetamine, Valium and marijuana.¹⁴² Dan’s damaged brain, which had been exposed to multiple traumatic events since childhood, could not process the losses he had suffered. A normal, well-adjusted person could cope with no longer having a job or a significant other; but for Dan, the devastation was unmanageable. He reached a boiling point and exploded. For the first time in Dan’s life, instead of inflicting severe pain upon himself, he inflicted it upon others. What started as a plan to steal a few dollars from his roommate turned into a tragedy for Carlos Froylan Cruz-Ramos and Kevin Swaney.

¹⁴¹Ex. 12 at 3.

¹⁴²Psychological Evaluation of John Matzke, Report of Daniel W. Wynkoop, Ed.D., Psychological Evaluation of John Matzke, Report of Daniel W. Wynkoop, Ed.D., attached as Ex. 45, at 4.

The Crime

*Dan's mental condition "seriously impaired his judgement [sic], [and] caused him to blackout for many events of that weekend."*¹⁴³

– Eugene Almer, M.D.

In affirming Dan's convictions and death sentence, the Arizona Supreme Court detailed the facts of the crimes:

Carlos Cruz Ramos was a Guatemalan national employed at the same restaurant where Cook and Matzke worked. He had recently moved into their apartment. According to Matzke, Cook devised a plan to steal Cruz Ramos' money. While Matzke distracted Cruz Ramos, Cook stole approximately \$90 from Cruz Ramos' money pouch. Shortly afterward, Cruz Ramos noticed his money was missing, and asked Cook and Matzke whether they knew anything about it. The two then lured Cruz Ramos into Cook's upstairs bedroom. They pushed Cruz Ramos down on the bed and, using strips torn from Cook's sheets, gagged him and tied him to a chair.

Over the course of the next six or seven hours, Cruz Ramos was cut with a knife, beaten with fists, a metal pipe and a wooden stick, burned with cigarettes, sodomized, and had a staple driven through his foreskin. Matzke suggested that they kill Cruz Ramos because they could not let him go. Cook replied that Cruz Ramos should be killed at midnight, 'the witching hour.' When midnight arrived, Matzke first tried to strangle Cruz Ramos with a sheet. Matzke then took Cruz Ramos out of the chair, put him on the floor, and pushed down on his throat with a metal pipe. According to Matzke, because Cruz Ramos still would not die, Cook pressed down on one end of the pipe while Matzke pressed on the other. Finally, Matzke stood on the pipe as it lay across Cruz Ramos' throat and killed him.

* * * *

Kevin Swaney was a sixteen-year-old runaway and sometime guest at the apartment. He was a dishwasher at the restaurant where the others worked. Shortly after 2:00 a.m., approximately two hours after Cruz

¹⁴³Ex. 12 at 6-7.

Ramos' death, Swaney stopped by the apartment. Cook initially told Swaney to leave, but subsequently invited him inside. Cook and Matzke told Swaney they had a dead body upstairs and, according to Matzke, Cook took Swaney upstairs and showed him Cruz Ramos' body. Swaney was crying when he and Cook returned downstairs. Cook reportedly told Swaney to undress, and Swaney complied, and Cook and Matzke then gagged him and tied him to a chair in the kitchen. Matzke said he told Cook that he would not witness or participate in Swaney's torture. Matzke then went into the living room and fell asleep in a chair.

Cook later woke Matzke, who said he saw Swaney bound and gagged, sitting on the couch, crying. Cook told Matzke he had sodomized Swaney and that they had to kill him. Matzke said they tried to strangle Swaney with a sheet, but Matzke's end kept slipping out of his hands. Cook then reportedly stated 'this one's mine,' placed Swaney on the floor, and strangled him.¹⁴⁴

The day after Swaney was killed, in the early morning of July 21, 1987, Matzke went to the police and confessed after a coworker persuaded him to do so.¹⁴⁵ His more-than-hour-long statement was recorded on videotape and provided details of his, as well as Dan's, involvement in each of the crimes.¹⁴⁶ Shortly after Matzke's confession, Dan was arrested. When asked by the detective how two bodies ended up in his apartment, Dan stated, "we got to partying; things got out of hand; now two people are dead." When asked how they died, Dan said "my roommate killed one and I killed the other."¹⁴⁷ Dan's statement was never recorded and lacked any other details.

¹⁴⁴*State v. Cook*, 170 Ariz. 40, 45-46, 821 P.2d 731, 736-37 (Ariz. 1991).

¹⁴⁵*State v. Cook* Transcript of Jury Trial 6/28/88, attached as Ex. 54, at 46-47.

¹⁴⁶Ex. 54 at 117.

¹⁴⁷*Cook*, 821 P.2d at 738.

Matzke was evaluated by a psychologist two months after the crimes. Matzke was “extremely descriptive regarding the events before, during and after the . . . crimes.”¹⁴⁸ In fact, Matzke was lucid enough to leave the apartment to purchase beer with the money stolen from Carlos, and return to participate in and watch what Matzke called “fun.”¹⁴⁹ Matzke was “intrigued” by killing Carlos, and described the torture in graphic terms. He was “quite clear he was the one responsible for . . . killing [] Carlos.”¹⁵⁰ Matzke was “equally descriptive in describing the killing of Kevin Swaney.”¹⁵¹

By contrast, Dan was “amnesic”¹⁵² and “black[ed]out”¹⁵³ during the crime. The psychiatrist who evaluated Dan five months after the crime said Dan’s judgment was “seriously impaired,” and he was impulsive, lacking normal inhibition.¹⁵⁴ Dan—who had consumed methamphetamine, alcohol, Valium, and marijuana on the day of the crimes¹⁵⁵—had severe toxicity with major impairment of his reasoning.¹⁵⁶

¹⁴⁸Ex. 54.

¹⁴⁹Ex. 54.

¹⁵⁰Ex. 54 at 4.

¹⁵¹John Matzke Pre-Sentence Report, attached as Ex. 44.

¹⁵²Psychological Evaluation of Daniel Cook, Report of Daniel W. Wynkoop, Ed.D., attached as Ex. 14, at 6.

¹⁵³Ex. 12 at 7.

¹⁵⁴Ex. 12 at 6-7.

¹⁵⁵Ex. 12 at 4-5; Ex. 14 at 3.

¹⁵⁶Ex. 14 at 6.

Moreover, the record indicates that Dan was experiencing amphetamine-induced delusional disorder and disassociated from reality.¹⁵⁷ According to Matzke, Dan appeared “crazy,” with a “crooked smile,” and he was “drooling.”¹⁵⁸ Matzke also said that Dan accused Carlos of being a spy, and made references to the CIA and Oliver North. Dan kept asking Carlos to take him to his leader.¹⁵⁹ These persecutory statements were not reality-based; they were a symptom of Dan’s psychotic state.¹⁶⁰

Even though he cannot recall specifics from the night of the crime, Dan has expressed deep remorse. Matzke, on the other hand, “expressed a lack of feeling for the victims then or now; an excitement both in participating in the crime and observing the torture and sexual assault on both Carlos and Kevin.”¹⁶¹ A presentence report writer noted that Matzke seemed “devoid of a conscience.”¹⁶² Matzke even wrote letters before trial saying that he had planned to tell everyone he had lied in his statement to the police.¹⁶³ To this day, Matzke has not apologized for his conduct in this case or his actions that led to the death of Carlos and Kevin.

¹⁵⁷Ex. 10 ¶ 92.

¹⁵⁸Interview of John Matzke, December 17, 1987, attached as Ex. 46, at 41.

¹⁵⁹Ex. 10 ¶ 63.

¹⁶⁰Ex. 10 ¶ 92.

¹⁶¹Ex. 44 at 7.

¹⁶²Ex. 44 at 12.

¹⁶³Letters (Defense Exs. A & B at trial), attached as Ex. 47.

While Dan’s mental illness makes it impossible for him to recall the details of the crime, he was not alone when he committed the crimes that led him to death row. From the time he was younger, Dan has had a dependent personality.¹⁶⁴ In a mental health report written three years before the crime, Dan was described as relying “very heavily on friends and the approval of friends.”¹⁶⁵ Dan is a follower,¹⁶⁶ and Dan has a “misguided sense of loyalty to others.”¹⁶⁷ Without Matzke’s assistance and encouragement, this crime likely would not have occurred.

Dan’s Court Proceedings

Dan’s attorney was “at the low end of the competency scale . . . [and] appeared neither capable nor willing . . . to represent a defendant charged with a capital offense.”¹⁶⁸
– Eric Larsen, Trial Prosecutor

Being poor, Dan was assigned a court-appointed lawyer who was unable to handle the gravity of Dan’s case. His lawyer was frequently drunk. With little understanding of the justice system or his rights, Dan saw self-representation as his only solution to overcoming his incapable attorney. When Dan recognized he was in far over his head and asked for expert assistance with sentencing, the judge denied his request. This denial

¹⁶⁴Ex. 17 at 17.

¹⁶⁵Ex. 17 at 17.

¹⁶⁶Ex. 41 ¶ 2; Ex. 40 ¶ 22; Ex. 39 ¶ 13; Ex. 59.

¹⁶⁷Ex. 41 ¶ 2.

¹⁶⁸Affidavit of Eric Larsen, attached as Ex. 2.

effectively refused Dan the opportunity to present evidence in mitigation of his crime. The judge, who had predetermined the sentence six months before trial, imposed death sentences for both convictions.

1. Dan’s court-appointed attorney was drunk and incompetent

Claude Keller, Dan’s court-appointed attorney, was a known alcoholic¹⁶⁹ without the experience or professional capability to handle a felony case, let alone a complex capital case such as Dan’s.¹⁷⁰ In the months after the indictment, Keller did virtually no investigation, and developed no theory of defense or plan for mitigation.¹⁷¹ Dan also smelled alcohol on Keller’s breath in court.¹⁷² Because Dan was worried that no defense was being prepared by Keller, he filed a motion to waive counsel. Despite the judge’s warnings to Dan about the problems with self-representation, he was never informed that instead of representing himself, he could have asked for appointment of a different

¹⁶⁹Declaration of Max Stokes, attached as Ex. 3, ¶ 3; *State v. Cook*, Transcript of Post-Conviction Hearing 12/2/94, attached as. Ex. 51, Testimony of Claude Keller, Tr. 12/2/94 at 91.

¹⁷⁰Ex. 2; *see also* Ex. 51, Testimony of attorney Michael Burke at 44 (Keller was “absolutely not competent to handle capital cases.”); Ex. 51, Testimony of attorney Ronald Wood, at 62-67 (“I can recall having a conversation with Judge Conn wherein he indicated that he didn’t think Claude was doing a very good job. . . .[H]e didn’t think Claude was one of these lawyers who was going to be able to handle complex things.”); Ex. 51, Testimony of attorney Mary Ruth O’Neill, at 21-23 (“[W]hile Claude may have been competent to do some things like misdemeanors, . . . he was not competent to represent a defendant in a complex criminal case.”).

¹⁷¹Affidavit of Daniel Wayne Cook, attached as Ex. 4. It is well-settled that when representing capital defendants, the Constitution requires that “make reasonable investigations or [] make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

¹⁷²Ex. 4.

attorney.¹⁷³

The judge never even asked Dan why he wanted to waive his right to counsel. Instead, the judge granted Dan's motion. And, over Dan's objection, Keller was appointed to serve as advisory counsel for Dan.¹⁷⁴ Dan's fears regarding Keller's incompetence were well founded, as Keller failed to comport himself as a professional or comply with the ethical rules governing attorney conduct. On several occasions during trial, the jury foreman saw Keller sleeping after lunch.¹⁷⁵ The foreman also saw Keller having cocktails during lunch break at a local bar at the time of the trial.¹⁷⁶

2. Dan's proceedings resulted in an uninformed and unreliable sentence

Judge Conn, who presided over Dan's trial, predetermined Dan's guilt and sentence. He begrudgingly accepted codefendant John Matzke's plea in order to be sure that Dan would be sentenced to death. In sentencing Matzke *nine months before he sentenced Dan*, Judge Conn told him: "I just want to make sure you understand what kind of deal you are getting, Mr. Matzke. You have escaped what would have been almost *guaranteed imposition of the death penalty* by myself. . . . [T]he deal or disposition that was made in your case is a necessary evil that has been condoned under the circumstances to *make sure Mr.*

¹⁷³Ex. 4.

¹⁷⁴*State v. Cook*, Transcript of Waiver of Counsel Hearing, 4/21/88, attached as Ex. 48.

¹⁷⁵Ex. 3 ¶ 4.

¹⁷⁶Ex. 3 ¶ 3. This same juror had a drink or two himself at lunch break during Dan's trial.

Cook is punished in a way that would be appropriate.”¹⁷⁷ Judge Conn had decided before Dan was even convicted and without knowing anything about Dan that Dan deserved the death penalty for this crime.

After he was convicted, Dan was left with the challenge of preparing for sentencing in a capital case. This was a feat that even Judge Conn had recognized as impossible for a defendant representing himself. In fact, in a previous death penalty sentencing that occurred only months before Dan’s case, when the defendant wanted to represent himself at sentencing, Judge Conn stated that there was no “way that you can possibly *under the consequences* have self representation.”¹⁷⁸ But Judge Conn let Dan represent himself, perhaps knowing that it wouldn’t matter; Judge Conn had already decided that Dan was going to get the death penalty.

Dan asked the judge for an expert to prepare his mitigation case for sentencing. At the hearing on that motion, Dan told the judge that he needed an expert to explain his mental illnesses and life history.¹⁷⁹ While Judge Conn asserted that he agreed that it was “imperative” for him to “have every source of information” and “any possible

¹⁷⁷ *State v. Matzke*, Transcript of Change of Plea, 12/11/87, attached as Ex. 53, 80-81 (emphasis added). Moreover, Judge Conn told Matzke that he wanted to “come off the bench and attack [him].” Ex. 53 at 82.

¹⁷⁸ *State v. Henry*, Transcript of Pre-Sentence Hearing, 1/6/88, attached as Ex. 52 (emphasis added).

¹⁷⁹ *State v. Cook*, Transcript of Request for Expert Assistance, 8/4/88, attached as Ex. 49, at 2-3.

evidence that might show mitigation,”¹⁸⁰ he nevertheless denied Dan’s request. Dan was unaware that he could present mitigating evidence in other ways; he thought an expert witness was the only available option.¹⁸¹

Accordingly, Judge Conn’s denial of Dan’s request for an expert deprived Dan of his opportunity to develop and present his mental health issues to the court at sentencing. When mitigating mental health evidence exists, it is not simply something that can be overlooked. Rather, the constitutional framework *requires* that a sentencer consider all aspects of the defendant’s character before imposing a death sentence.¹⁸² As Justice O’Connor has explained: “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, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . [T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime rather than mere sympathy

¹⁸⁰Ex. 49 at 3.

¹⁸¹Ex. 49 at 5 (When told the court was denying his request, Dan responded, “I’m not an expert in this field. I don’t even know where to go on this anymore.”).

¹⁸²*Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendments require that the sentencer in capital cases must not be precluded from considering any relevant mitigating factor); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (sentencer may not “refuse” to consider, *as a matter of law*, any relevant mitigating evidence”).

or emotion.”¹⁸³

At his sentencing, Dan was frustrated and full of despair. On the same day that the court denied Dan expert assistance to help him present his case, he wrote a letter to the presentence investigator—who recommended a death sentence—thanking her for her support in his goal to commit suicide.¹⁸⁴ His letter also expresses his continued desire to protect his mother, even though Wanda did nothing to protect him and provided harmful information to the presentence investigator. Wanda, on the other hand, has been known to lie to help her other son George.¹⁸⁵

When Dan went to his sentencing on August 8, 1988, he was hopeless and, once again, attempted to commit suicide by asking for the death penalty. He told Judge Conn: “Only sentence I will accept from this Court at this time is the penalty of death.”¹⁸⁶ This was not the considered decision of a competent and fully informed man. Indeed, only four days prior, Dan told the court: “being convicted of these charges was a traumatic

¹⁸³ *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring).

¹⁸⁴ See Supplemental Pre-Sentencing Investigation Report, attached as Ex. 16.

¹⁸⁵ Glendale Police Report on George Dunn 3/28/01, attached as Ex. 31, at 2-4. Police officers arrived after receiving a report of a domestic dispute between George and his girlfriend. The girlfriend said her boyfriend’s name was Michael Duncan. Wanda confirmed his name was Michael Duncan. The officer ran a registration check on Wanda’s vehicle and it came back registered to her and a male (George). Wanda admitted she lied to the officer. She was trying to protect George because he had warrants for his arrest.

¹⁸⁶ *State v. Cook*, Transcript of Sentencing, 8/8/88, attached as Ex. 50, at 4.

experience. It has screwed up my head considerably since then.”¹⁸⁷ Judge Conn, who had decided months before Dan’s trial what sentence Dan should receive, complied with Dan’s wishes. Despite his statement indicating he would only accept a death sentence, Dan did, and continues to, want to live. But as with many other times in his life, Dan thought he had no options, and no hope.

The State alleged two aggravating circumstances for Carlos’s murder: that the murder occurred for pecuniary gain, and that it was cruel, heinous or depraved. Judge Conn found the two aggravating circumstances alleged, but also on his own volition found a third: that Dan was convicted of one or more other homicides that were committed during the commission of the offense. The State alleged one aggravating circumstance for Kevin’s murder: that the murder was cruel, heinous or depraved. Judge Conn found the one aggravating circumstance alleged, but like he did for the other murder, also found that Dan was convicted of one or more other homicides that were committed during the commission of the offense. Even though the prosecutor—whose job it is to present facts supporting aggravating circumstances—never even argued the multiple homicide aggravator, Judge Conn attempted to find as many aggravating circumstances as he could against Dan.¹⁸⁸

¹⁸⁷Ex. 49 at 4.

¹⁸⁸At the time Dan was sentenced to death, the judge determined the existence of aggravating circumstances. Since that time, however, the United States Supreme Court has held that under the Sixth Amendment, a jury rather than a judge must find aggravating facts to make defendants eligible for the

Not surprisingly, Judge Conn found no mitigating circumstances.¹⁸⁹ Judge Conn discounted the limited mental health information that he had as a result of Dan’s pretrial competency evaluations. Judge Conn found that information about Dan’s mental health and previous suicide attempts had no link to the crime.¹⁹⁰ And despite the pretrial competency report that stated that Dan was “under the heavy influence of alcohol and drugs” at the time of the crime and “it seriously impaired his judgement, caused him to blackout for many of the events of that weekend and provided him with lack of normal inhibition producing more impulsive behavior,”¹⁹¹ Judge Conn found that nothing was presented to justify a finding that Dan was under the influence of alcohol or drugs that would have affected his ability to appreciate or conform his conduct.¹⁹² This finding ignored the facts in the record.

Judge Conn also rejected Dan’s lack of prior felony convictions as a mitigating

death penalty. *Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁸⁹Ex. 50 at 21.

¹⁹⁰The requirement that Judge Conn imposed requiring that mitigating circumstances have a causal connection to crime was Arizona law at the time of Dan’s sentence but has since been held as unconstitutional. See *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding that the Eighth Amendment requires that capital sentencing body must be allowed opportunity to consider relevant mitigating evidence even if defendant cannot establish nexus between such evidence and the crime); *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2010) (holding that the Arizona Supreme Court’s imposition of a nexus requirement was unconstitutional).

¹⁹¹Ex. 12 at 6-7.

¹⁹²Ex. 50 at 16.

circumstance.¹⁹³ He did so because he found that Dan had an “extensive” misdemeanor record and that meant he could reject the lack of felony convictions as a mitigating circumstance. This logic is absurd. Dan’s “extensive” misdemeanor record were between the years of 1983 and 1986, and no offenses occurred in fifteen months prior to the homicides.¹⁹⁴ His misdemeanor record included five “disorderly conduct” charges, all of which involved his use of alcohol. At least two of those charges involved an attempted suicide.¹⁹⁵ He had one charge for threatening/intimidating where he only served one week in jail. In that case, he was drunk at a local bar and called his mother saying he was going to get into a fight; his mother called the police. He was placed in the state hospital.¹⁹⁶ He had one charge for false reporting, which was during the fall of 1984, when he had been admitted to the state hospital several times and suffered acute psychosis.¹⁹⁷ His other misdemeanor was for failure to comply with court order/fail to pay fine. He received jail time in six cases, but it was suspended or postponed in at least three of them. He was fined four times, for a total of less than \$600. These non-violent misdemeanors should not have the sentencing judge from finding Dan’s lack of felony

¹⁹³Ex. 50 at 18-19.

¹⁹⁴Presentence Report, attached as Ex. 15 (U.S. Dept. Of Justice FBI Criminal History Sheet).

¹⁹⁵Ex. 15 (U.S. Dept. Of Justice FBI Criminal History Sheet); Ex. 15 at 7; Ex. 13 at 1.

¹⁹⁶Ex. 15 at 7.

¹⁹⁷Ex. 13 at 1.

record as a mitigating circumstance.

Judge Conn told Dan, “I absolutely would not consider giving you anything less than the death penalty.”¹⁹⁸ In fact, Judge Conn invoked emotion and said, “[T]his is one case in which I almost *relish* giving you the death penalty.”¹⁹⁹ And, as Judge Conn promised would happen when he sentenced Matzke eight months prior, he sentenced Dan to death—twice—with the sentences to be served consecutively.²⁰⁰

Powerful Mitigation Evidence Makes a Difference

*“Had I been informed of this mitigating information . . .
I would not have sought the death penalty.”²⁰¹*

—Eric Larsen, Trial Prosecutor

Because Dan’s request for an expert to prepare for sentencing was denied and because Dan had incompetent counsel who did no mitigation investigation, no information was presented regarding Dan’s mental illnesses or his abusive background.²⁰² We now know quite a bit about Dan’s horrific childhood and the resulting mental illnesses that he suffers. As explained earlier, at the time of the crime, Dan suffered from

¹⁹⁸Ex. 50 at 21.

¹⁹⁹Ex. 50 at 22 (emphasis added).

²⁰⁰Ex. 50 at 23.

²⁰¹Ex. 1 ¶ 9.

²⁰²And this legal claim was never heard by the courts because Dan’s post-conviction counsel was ineffective. Declaration of Michael Terribile, attached as Ex. 6.

PTSD and organic brain damage.²⁰³ The abuse Dan suffered as a child, which was mitigating evidence that should have been presented, is inextricably linked to the crime itself. The abuse that Dan suffered as a child was the same abuse he inflicted upon the victims in his psychotic and delusional state.

Eric Larsen, the trial prosecutor, has said: “Had I been informed of this mitigating information regarding Dan’s severely abusive and traumatic childhood and his mental illnesses, I would have not sought the death penalty in this case.”²⁰⁴ Larsen has also said that, had he known about Dan’s background, “it certainly would have explained his behavior. In fact, the *childhood abuse he suffered mirrored the circumstances surrounding the crime.* I would have, therefore, not been in favor of seeking a death sentence in his case.”²⁰⁵ Larsen’s statements and Dan’s serious mental illness offer a context that supports this Board recommending that Dan’s life be spared. Accordingly, this Board should not overlook the highly important declaration of the person who, at the time, had the authority and responsibility in seeking the death penalty.²⁰⁶

At an even more basic level, this Board should not allow the execution of such a seriously mentally ill man. The National Alliance on Mental Illness actively opposes the

²⁰³ See Ex. 10 ¶¶ 81, 87; Ex. 11.

²⁰⁴ Ex. 1 ¶ 9.

²⁰⁵ Ex. 1 ¶ 10 (emphasis added).

²⁰⁶ Ex. 1 ¶ 2.

execution of persons with serious mental illness because it recognizes a powerful truth about persons with mental illness: *Impaired judgment, understanding and impulse-control frequently are present in persons with severe mental illness.*²⁰⁷ The United States Supreme Court banned the execution of mentally retarded persons²⁰⁸ and of juvenile offenders²⁰⁹ based on the existence of these factors in both the mentally retarded and the juvenile offender, which raises “serious questions about whether the death penalty should be similarly banned for defendants with these illnesses.”²¹⁰ Based on the fact that Dr. Schwartz-Watts has identified all of these factors—impulsivity, as well as impaired judgment and understanding—in Dan,²¹¹ this Board has the power to show mercy to this seriously mentally ill man by recommending that Dan’s life be spared.

²⁰⁷*Prevention, Not Execution: Eliminating the Death Penalty for People with Severe Mental Illness*, http://www.nami.org/Content/ContentGroups/Policy/CIT/Prevention,_Not_Execution_Eliminating_the_Death_Penalty_for_People_with_Severe_Mental_Illness.htm (last visited July 27, 2012).

²⁰⁸*Roper v. Simmons*, 543 U.S. 551 (2005).

²⁰⁹*Atkins v. Virginia*, 536 U.S. 304 (2002).

²¹⁰*Prevention, Not Execution: Eliminating the Death Penalty for People with Severe Mental Illness*, http://www.nami.org/Content/ContentGroups/Policy/CIT/Prevention,_Not_Execution_Eliminating_the_Death_Penalty_for_People_with_Severe_Mental_Illness.htm (last visited July 27, 2012).

²¹¹Ex. 10 ¶¶ 72, 85, 88, 90.

Dan accepts responsibility for his actions and can live peacefully in prison

Dan “would live the remainder of his days in the structured environment without any problems and continue to grow as a person.”

– ADC Sergeant Gabriel Lagunas

Dan has been housed in the Arizona Department of Corrections (ADC) since August 1988. Imprisonment has provided Dan with the stability in his life that he needs. There are few programs for those on death row for personal development, to treat their mental illnesses, and to learn new skills. But Dan has improved himself to the extent possible.

Dan’s assimilation into prison began as soon as he entered the system. His prison file indicates that within a year-and-a-half of beginning his sentence, Dan’s institutional risk score was the lowest possible,²¹² which he has maintained throughout his sentence.²¹³ He has also held several jobs in prison, when death row prisoners were allowed to work. For almost a decade after he entered prison, Dan’s work ratings were regularly the highest that he could achieve.²¹⁴ Sgt. Daniel McClincy, an ADC Officer who supervised Dan in 1996 and 1997 in the law library, reports that Dan did his job well and received the highest possible scores on his work performance evaluations.²¹⁵ McClincy also notes

²¹²Excerpts from ADOC Master File of Daniel Cook, attached as Ex. 55, Reclassification Score Sheets, 2/16/90 and 8/16/90.

²¹³Ex. 55.

²¹⁴Ex. 55.

²¹⁵Declaration of Daniel McClincy, attached as Ex. 8.

that Dan, unlike other inmates, did not try and “game” him.²¹⁶ Even in more menial jobs, Dan applied himself and used his new-found stability to obtain a measure of success for the first time in his life. He was diligent in his duties, reporting even minor safety concerns to prison staff²¹⁷ and working through injuries.²¹⁸ Sgt. Gabriel Lagunas, another ADC Officer who has known Dan since 1990, says that Dan is a good worker, who did what was asked of him.²¹⁹ Sgt. Lagunas’s wife, Lydia Lagunas, was also an ADC Officer. She recalls Dan from her time working in the CB6 Unit and said that he “automatically did what was asked of him and more.”²²⁰

Dan has matured and adapted to his life in prison. While he has been the subject of some minor disciplinary incidents over nearly twenty-four years in prison (less than one a year on average), none of his violations ever involved acts of violence.²²¹ Further,

²¹⁶Ex. 8.

²¹⁷Information Report 5/1/94, attached as Ex. C; Information Report 3/5/95, attached at Ex. D; Incident Report 3/15/92, attached as Ex. F; Incident Report 3/23/92, attached as Ex. E.

²¹⁸Incident Report 10/12/93, attached as Ex. G; Incident Report 10/5/93, attached as Ex. H; Incident Report 9/1/93, attached as Ex. I; Incident Report 8/12/91, attached as Ex. J.

²¹⁹Ex. 7 ¶ 2.

²²⁰Ex. 9 ¶ 4.

²²¹Often, the violations were the result of Dan failing to maintain his cell, make his bed, refusing to eat, and other relatively minor infractions. These types of violations could also be the result of Dan’s depression and other mental health issues, including starvation as self-injury and self-mutilation. The most serious allegation was a threat that Dan made to a nurse in 1997, which occurred the day after a verbal altercation with the same nurse, who accused Dan of calling her a name.

Dan has not had a citation of *any* kind in the last eight years.²²² In fact, one time Sgt. Lagunas was in the kitchen with Dan when the lights went out, making it pitch dark.²²³ Sgt. Lagunas did not feel in danger of Dan, who was unrestrained.²²⁴ Sgt. Lagunas says that Dan gets along with other inmates and prison staff and is “an easy inmate to deal with.”²²⁵ If given the chance to live in prison, Dan will not be a danger to staff or other inmates.

Dan has also served as a model to other inmates. He is helpful and has positive traits to share with those around him. Mrs. Lagunas interacted with Dan when he worked in the law library.²²⁶ Mrs. Lagunas said that he was always willing to help other inmates when they had questions. In fact, Dan even helped her when she needed assistance with lifting heavy items.²²⁷ Dan also stood up for Mrs. Lagunas when other inmates called her names or put her down, telling the other inmates to have the same respect for her that she showed them.²²⁸

²²²Dan’s most recent citation, in 2002, was for failing to remove a cover on the light in his cell and resulted in only a verbal reprimand. *See* Excerpts from ADOC Master File of Daniel Cook, ADOC Inmate Record.

²²³Ex. 7 ¶ 2.

²²⁴Ex. 7 ¶ 2.

²²⁵Ex. 7 ¶ 3.

²²⁶Ex. 9 ¶ 4.

²²⁷Ex. 9 ¶ 4.

²²⁸Ex. 9 ¶ 5.

While in prison, Dan has also called on the sensitive and creative sides that he exhibited as a child and young adult. He is a wonderful artist and a prolific writer. Mrs. Lagunas confirms that Dan is intellectual, creative, and a good artist.²²⁹ When Mr. and Mrs. Lagunas got married, Dan made them a wedding card, which they still have today.²³⁰

Dan does well in a structured environment and this past year has been the best one yet because he has been on proper medication. Even though Dan has mental illness, that does not prevent him from being productive and articulate. Further, it is not necessary to kill Dan to ensure that society is safe from him. He has accepted his conditions in prison and is capable of further development if allowed to live the remainder of his days confined. While housed in a maximum security facility for almost twenty-four years, Dan has not used his conditions as an excuse to become violent or give in to his mental difficulties. He has not harmed any other individuals. In a place where the culture breeds violence on occasion, Dan has never assaulted a corrections officer or fellow inmate.

Conclusion

As this Board knows, clemency is “an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is

²²⁹Ex. 9 ¶ 3.

²³⁰Ex. 7 ¶ 3; Ex. 9 ¶ 5.

bestowed, from the punishment the law inflicts from a crime he has committed.”²³¹ It “exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”²³² In light of the close correlation between his abusive childhood, his resulting mental illness and brain damage, and the crimes in this case, Dan’s sentence is unduly harsh. Moreover, based on the failure of Dan’s attorney to conduct a mitigation investigation, an evident mistake occurred.

Dan is not a danger to others and executing him would serve no purpose in protecting society.²³³ In the words of ADC Sgt. Lagunas, who has over thirty years of experience as a correctional officer, “If Dan received a commutation of his sentence to life without parole, I believe he would live the remainder of his days in the structure[d] environment without any problems and continue to grow as a person.”²³⁴ For all the reasons explained in this Application, Dan respectfully asks this Board to impart mercy upon him and recommend that his sentence be commuted to life without parole.

²³¹*United States v. Wilson*, 32 U.S. 150, 160 (1833).

²³²*Ex parte Grossman*, 267 U.S. 87, 120 (1925).

²³³Ex. 38; Ex. 39, ¶ 13; Ex. 37 ¶ 8; Ex. 59; Ex. 41 ¶ 8; Ex. 40 ¶ 27; Ex. 56; Letter to the Clemency Board from Karin Ekhard, attached as Ex. 58; Ex. 57; Ex. 36; Ex. 28 ¶ 23; Ex. 29 ¶ 18.

²³⁴Ex. 7 ¶ 4.