

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL WAYNE COOK,
PETITIONER,

-vs-

CHARLES L. RYAN, Director
Arizona Department of Corrections,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
CAPITAL CASE
EXECUTION SCHEDULED AUGUST 8, 2012

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CAPITAL CASE

EXECUTION SCHEDULED FOR AUGUST 8, 2012

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit err by determining that Petitioner is not entitled to re-open his federal habeas proceedings based on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to try to establish cause for his procedurally-defaulted ineffective-assistance-of-counsel claim, when (1) Cook represented himself at trial and sentencing, (2) Cook waived presentation of mitigation evidence at sentencing, and (3) the state post-conviction court specifically ruled that the mitigation evidence Cook claims should have been developed would not have changed the sentence imposed.

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OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit upheld a ruling by the United States District Court for the District of Arizona denying Petitioner Daniel Cook's motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. The Ninth Circuit's ruling is reported at 2012 WL 3055929, (9th Cir., July 27, 2012). Cook's Appendix A. The District Court's order is attached to Cook's petition as Appendix B. The decision of the Mohave County Superior Court denying relief on Cook's third petition for post-conviction relief is attached to Cook's petition as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction to address Cook's timely appeal from the Ninth Circuit's ruling denying relief on his Rule 60(b)(6) motion. *See* 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

Daniel Cook is on death row in Arizona for two 1987 murders. *State v. Cook*, 821 P.2d 731, 738 (Ariz. 1992). Cook and his roommate John Matzke tortured, sodomized, and killed Carlos Cruz Ramos and Kevin Swaney in Cook and Matzke's apartment in Lake Havasu City, Arizona. *Id.* at 736–37. The torture included burning one of the victims with a cigarette and stapling his foreskin to a chair. *Id.* When Matzke reported the murders to the police, officers went to the apartment, advised Cook of his *Miranda* rights, and then asked him why there were two dead bodies in the apartment. Cook replied, “we got to partying; things got out of hand; now two people are dead.” When asked how they died, Cook said, “My roommate killed one and I killed the other.” *Id.* at 737.

The procedural history of this case is set forth in the Ninth Circuit's Opinion. Appendix A, at 6-17.¹ With regard to Cook's claim that this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), warrants reopening his federal habeas proceeding to present additional argument regarding ineffective assistance of counsel for failing to develop mitigation evidence, the relevant facts include that Cook voluntarily chose to represent himself at trial and sentencing, and that he personally declined to present any evidence to the court at sentencing. *Cook*, 821 P.2d at 737-38.

Cook filed a petition for post-conviction relief (“PCR”) in 1993, raising a claim that counsel was ineffective prior to Cook's decision to represent himself. *See Cook v. Schriro*, 538 F.3d 1000, 1012–13 (9th Cir. 2008) The state trial court conducted

¹ The Appendices referenced herein are those submitted by Cook.

an evidentiary hearing in 1994, after which it denied Cook's claim as meritless. Cook's post-conviction counsel did not, however, raise this claim in Cook's petition for rehearing, so the claim was not considered as part of the petition for review he submitted to the Arizona Supreme Court. *Id.* at 1013. Accordingly, on federal habeas review, this claim was found to be procedurally barred. *Id.* at 1024–27.

After Cook's federal habeas proceedings concluded, he filed (in 2009) a second PCR petition challenging Arizona's lethal-injection protocol and also asserting that pretrial counsel was ineffective for failing to investigate mitigating evidence. In December 2009, the trial court denied the PCR petition after concluding, among other things, that Cook's pretrial ineffective-assistance claim had been previously litigated and therefore was barred. In September 2010, the Arizona Supreme Court denied Cook's petition for review, and the State again sought a warrant of execution.

In November 2010, while the warrant request was pending, Cook filed a third PCR petition seeking relief on the ground that newly discovered information likely would have changed the sentencing determination. Appendix C, at 5–9. Cook specifically 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. The trial court (the same judge who sentenced Cook to death) 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." *Id.* at 6. The state 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.” *Id.* at 7.

REASONS FOR DENYING THE WRIT

Under Supreme Court Rule 10, certiorari review should only be granted for “compelling reasons.” Cook has not presented any such reasons for this Court to exercise its discretion and accept certiorari review.

The Ninth Circuit correctly concluded that *Martinez* does not apply to this case given Cook’s decision to represent himself during his trial and at sentencing. Appendix A, at 2-3, 22-24. The Ninth Circuit also correctly concluded that, even if Cook’s *pre-trial* counsel could be faulted for not developing a mitigation case based on information that Cook knew but decided not to disclose, Cook could not establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), because he affirmatively chose not to present *any* mitigation information at sentencing.² *Id.* Finally, the Ninth Circuit correctly concluded that, even if Cook were not precluded from relief based on his decision to represent himself and to waive presentation of mitigation, he would not be entitled to relief under Rule 60(b)(6), because he did not establish “extraordinary circumstances” justifying the reopening of a final judgment. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

²*Strickland* requires that a defendant establish that his counsel performed deficiently and that the deficient performance prejudiced the defendant’s case, that is, that there is a reasonable probability, that but for counsel’s unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 694.

ARGUMENT

In *Faretta v. California*, 422 U.S. 806, 835 (1975), this Court explained that, “[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must ‘knowingly and intelligently’ forgo those relinquished benefits.” This Court also explained that, “whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’” *Id.* at 834 n.46.

In this case, prior to trial, Cook made a knowing, intelligent, and voluntary waiver of his right to counsel, and he represented himself at trial and sentencing. Thus, *Faretta* precludes Cook from complaining about the “quality of his own defense.” Consequently, as the Ninth Circuit noted, *Martinez* (which creates an exception to the rules of procedural default in federal proceedings for prisoners with a potentially legitimate claim of ineffective assistance of trial counsel), does not apply to Cook. Appendix A, at 23.

Furthermore, even if Cook’s self-representation did not preclude relief, he is not entitled to relief under *Martinez* because his underlying ineffective-assistance-of-counsel claim is not substantial. *See Martinez*, 132 S. Ct. at 1318. Cook chose not to present mitigation at sentencing. Accordingly, assuming that his pre-trial counsel should have investigated information relating to possible avenues of mitigation (most of which involve facts known to Cook at the time of sentencing), Cook’s claim of ineffective assistance of pre-trial counsel is moot. *See Schriro v.*

Landrigan, 550 U.S. 465, 477 (2007) (“The District Court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence.”).

Finally, even assuming Cook’s self representation and his decision not to present mitigating evidence at trial did not preclude his current claim, he would not be able to establish prejudice under *Strickland* because the same judge who sentenced Cook to death in 1988 considered the new evidence Cook proffered in his third PCR proceeding in 2010 and found that the additional information would not have made a difference regarding the sentence imposed. Accordingly, and for the additional reasons detailed in the Ninth Circuit’s Opinion, this Court should summarily deny relief.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Cook’s Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

BRIEF IN OPPOSITION

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Brief in Opposition is double-spaced, uses a 12-point proportionately-spaced typeface, and contains 1,447 words.

DATED this 6th day of August, 2012.



KENT E. CATTANI

Division Chief

Criminal Appeals/Capital Litigation Division

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**STATEMENT OF MAILING
AFFIDAVIT OF SERVICE**

BRIEF IN OPPOSITION

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KENT E. CATTANI, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar. That on August 6, 2012, he emailed a copy of the Brief in Opposition to Petition for Writ of Certiorari to the United States Supreme Court. He caused to be shipped by Federal Express, 10 copies of the BRIEF IN OPPOSITION in *Daniel Wayne Cook v. State of Arizona*, No. 12-5585, addressed to:

THE HONORABLE WILLIAM K. SUTER
United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

And caused to be deposited in a United States Post Office, first-class postage prepaid, three (3) additional copies addressed to:

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That to his knowledge the email and Federal Express shipping and mailing of the Response in Opposition took place on August 6, 2012. All parties required to be served have been served.

Kent E. Cattani
KENT E. CATTANI

SUBSCRIBED AND SWORN to before me this 6th day of August, 2012.

Leticia Kugler
Notary Public

My Commission Expires: 8/14/14

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