No. 12A123

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2012

DANIEL WAYNE COOK,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

CAPITAL CASE
EXECUTION SET FOR 10:00 A.M. MST
(1:00 P.M. EDT) WEDNESDAY, AUGUST 8, 2012

REPLY ON APPLICATION FOR STAY OF EXECUTION

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The State rests most strongly upon its contention that "Cook's convictions and death sentences have been carefully reviewed in state and federal court dating back to his direct appeal proceedings in 1992." This broad statement is quite incorrect as relates to the question presented in this case. At best, only *one* out of *two* aspects of this case has received *any review at all.* Guilt stage issues have been reviewed. But the second half of the case, equally essential to a valid conviction comporting with the Eighth Amendment, never has been.

In order for a conviction and sentence of death to pass muster under the Eighth Amendment, a state *must* permit a defendant to present any mitigation; and *cannot* impose a death sentence unless, *after considering* such mitigation, aggravating circumstances outweigh mitigating factors. *E.g. Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Ake v. Oklahoma*, 470 U.S. 68, 87, 105 (1985). This has *never* occurred in Petitioner's case.

1. Petitioner's appointed counsel utterly failed to investigate or prepare a mitigation case.

2. The trial court refused Petitioner any assistance or expert appointment for mitigation purposes.

3. Petitioner's post-conviction counsel was abjectly ineffective, by doing nothing to plead a mitigation in any detail, investigate it or present it.

4. For *fifteen years*, throughout every phase of federal habeas corpus proceedings and in each federal court at every level, the *only* litigation that has occurred related to mitigation is the question whether Petitioner is entitled to have

a claim adjudicated that appointed trial, and post-conviction, counsel were ineffective, causing Petitioner prejudice.

5. For ten years in the state court the only litigation about mitigation was over Petitioner's putative waiver of mitigation.

6. For fifteen years in the federal court the only litigation about mitigation has been over Petitioner's default of a claim involving ineffective counsel and mitigation.

7. At no time, ever, has the State of Arizona addressed on the merits Petitioner's mitigation case – not in state court, and not in federal court.

The gist of the State's opposition to a motion for stay is the proposition that, irrespective of *what* was or was not "carefully reviewed in state and federal court," enough "review" has occurred, and that is that.

At no time has Petitioner been at fault for the twenty-five year course of litigation which never addressed the issue – so critical to a sentence comporting with the Eighth Amendment – that the "character and record of the accused" must be taken into consideration in capital sentencing. *Lockett, supra*; *Eddings, supra*; *Ake, supra.*

Petitioner has sought at every turn to have the ineffectiveness of his post-conviction counsel be recognized as cause excusing his default; and to have merits consideration of his claim that a substantial mitigation case could have been presented. Now this Court has said in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)

that the first should indeed happen, if there is "some merit" to the second. There is, and this Court should not deny a stay just because of the passage of time.

It is respectfully requested that the stay be granted.

Respectfully submitted.

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August 6, 2012

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