

No. 08-7229

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**IN THE  
SUPREME COURT OF THE UNITED STATES**  
October Term, 2011

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DANIEL WAYNE COOK,

Petitioner,

v.

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

Respondent.

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

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**CAPITAL CASE**

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**PETITIONER'S MOTION FOR LEAVE  
TO FILE OUT-OF-TIME PETITION FOR  
REHEARING OF PETITION FOR CERTIORARI**

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**MOTION FOR LEAVE TO FILE OUT OF TIME  
PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI**

Petitioner Daniel Wayne Cook respectfully seeks this Court's leave to file his Petition for Rehearing of Order Denying Certiorari outside the time limit prescribed in Rule 44.2.

**STATEMENT OF THE CASE**

This is a capital case. Petitioner presented, as a basis for review of the Ninth Circuit's judgment denying federal habeas corpus review, the same question as that raised in *Martinez v. Ryan*, No. 10-1001 (U.S. March 20, 2012) – whether ineffectiveness of what *Martinez* defined as “initial review” post-conviction counsel, for a claim of ineffective trial counsel, constituted “cause” excusing failure to exhaust the claim of ineffective trial counsel, in state court. This Court denied certiorari on January 22, 2009.

Thereafter, in state court litigation arising immediately after this Court's denial of certiorari in this case, after having received the assistance of the lawyers and expert resources of the Federal Public Defender for the District of Arizona, a truly compelling mitigation case was revealed, prompting Petitioner's return to the Arizona courts, in the case which is now before this Court as *Cook v. Arizona*, No. 10-9742. The question presented in No. 10-9742 was identical to that which had been presented to this Court in this case and in *Martinez*, in that it was grounded on a claim of federal constitutional right to counsel in the same circumstances as *Martinez*, although of course it did not involve the habeas corpus doctrine of “cause.”

This Court granted an application for a stay of execution in connection with No. 10-9742, but did not then act upon the petition for certiorari. Thereafter, this Court



Granted certiorari in *Martinez v. Ryan*, No. 10-1001. *Martinez*, of course, was a federal habeas corpus case, as is this case. But it presented the same issue, grounded in a federal constitutional issue, for which this Court had stayed Petitioner's execution in No. 10-9742. The Court held No. 10-9742 pending the resolution of *Martinez*.

But this Court held that *Martinez* was "not the case, however to resolve" the *constitutional* issue which Petitioner had presented here and in No. 10-9742. Thereafter, certiorari was denied in No. 10-9742. *Martinez* did not reject the constitutional claim presented here and in No. 10-9742, nor adjudicate it in any way. Thus, the constitutional issue upon which a stay of execution had been granted to Petitioner remains open.

Petitioner is concurrently filing a timely petition for rehearing in his just-denied state case, *Cook v. Arizona*, No. 10-9742, requesting this Court to grant rehearing, vacate its denial of certiorari, grant certiorari, reach and decide the constitutional issue presented there, in *Martinez*, and here. As pointed out in that motion, in order to stay Petitioner's execution, this Court would have concluded that it was likely to grant certiorari and hold that the case was erroneously decided below, *Barefoot v. Estelle*, 463 U.S. 880 (1983); thus emphasizing the substantiality of the constitutional issue, as presented in Petitioner's particular case.

Petitioner here respectfully requests this Court to at least vacate its denial of certiorari in this case, in light of its *Martinez* opinion, and remand for further habeas proceedings in light of *Martinez*, as it has just done in other cases.<sup>1</sup> Petitioner here submits that, while a grant of certiorari is appropriate in No. 10-9742 in order to decide the important constitutional issue, *at the very least* a grant, vacate and remand is

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<sup>1</sup> *Smith v. Colson*, No. 10-8629 (U.S. March 26, 2012); *Cantu v. Thaler*, No. 10-11031 (U.S. March 26, 2012); *Middlebrooks v. Colson*, No. 11-5067 (U.S. March 26, 2012); *Newbury v. Thaler*, No. 11-6969 (U.S. March 26, 2012).

appropriate in this case, which would be squarely controlled by *Martinez* but for the accident of the reverse sequence, wherein this Court first denied Petitioner's federal case petition (*i.e.* this case), then stayed and held his state court petition, only to deny it because it chose not to reach a constitutional issue, which Petitioner's current – state court review – case would require. The “equitable rule,” permitting ineffectiveness of post conviction in an “initial review” proceeding to be cause excusing failure to exhaust a *substantial* claim of ineffective trial counsel, precisely fits this case.

### ARGUMENT

**1. This Court has the power, in light of intervening circumstances and in the interests of justice, to grant this petition.**

This Court clearly has the power, in its discretion and in the interests of justice, to consider a petition for rehearing filed outside the formal limits imposed by Rule 44.2. *See United States v. Ohio Power Co.*, 353 U.S. 98 (1957)(granting certiorari out-of-time so that the “case might be disposed of consistently with [] companion cases”); *id.* at 99 (“We have consistently ruled that the interests in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.”); *Gondeck v. Pan Am World Airways, Inc.*, 382 U.S. 25, 26-27 (1965)(granting untimely petition for rehearing where “intervening circumstances of substantial . . . effect” merits grant of certiorari after deadline to file for rehearing).

This Court has found that the interest of justice and substantial intervening circumstances *did* exist to warrant granting out-of-time petitions for rehearing when an intervening case dictated changing the outcome. *E.g. Simmons v. Sea-Land Servs., Inc.* 462 U.S. 1114 (1983), granting rehearing, vacating and remanding for reconsideration in light of *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983); *Florida v.*

*Rodriguez*, 461 U.S. 940 (1983), same, in light of *Florida v. Royer*, 460 U.S. 491 (1983). Of particular interest is *United States v. Booker*, 543 U.S. 220 (2005), in light of which, it is reported, fourteen petitions for rehearing were granted. See Gressman, et. al. Supreme Court Practice §15.6(a) (Ninth Ed. 2007).). *Booker* involved the important right to a jury trial. This case involves the right to effective trial counsel, one at least equally important as the right to trial by jury decided in *Booker*.

That this petition is brought after three years is not an impediment for two reasons. First, such a time lag has not been a sufficient reason to deny relief that is otherwise warranted. In *Gondeck v. Pan Am World Airways, Inc.*, 382 U.S. 25, 26-27 (1965) certiorari had originally been denied more than three years before the Court ultimately granted rehearing. Indeed, the Court had even already denied a motion for rehearing, also more than three years previously. *Gondeck* involved a claim for wrongful death damages. This case involves executing petitioner. If a three year lag did not deter a grant of rehearing in *Gondeck* it should not do so here.

Perhaps more importantly, in this case the issue which *Martinez* affected has continued to be in active litigation by Petitioner, both in the Arizona courts and in this Court, between the denial of certiorari in this case in January of 2009, and the denial of certiorari in No. 10-9742 on March 25<sup>th</sup> of this year. The relief petitioner seeks in this petition for rehearing would not even require a rehearing decision by the Court had it been this case held for *Martinez*, rather than *Cook v. Arizona*, No. 10-9742. It would already have been covered by a grant, vacate and remand order along with other cases held for *Martinez*. See fn. 1, *supra*. Of even greater relevance is the fact that until just weeks ago, this Court had concluded that Petitioner ought not to be executed until his



claim was heard. Petitioner submits that he should not be denied that hearing as a result of the *Martinez* decision having been made as a matter of statutory “cause and prejudice” rather than constitutional law. Petitioner has asked this Court to hold that he, too, was excused by “cause” for failure to exhaust his ineffectiveness claim. Had the sequence of cases No. 08-7229 (*i.e.* this one) and No. 10-9742 been reversed, he would be automatically entitled to such relief. In a literal life-and-death case, such a procedural quirk ought not to dictate the outcome.

Not only are there substantial intervening circumstances warranting this Court’s action, but in the period while Petitioner’s case has been before the Court, extraordinarily strong evidence of a missed-mitigation case were revealed. Thus, as is now shown, there is a strong justice interest in granting this motion. The motion is not simply brought as a matter of routine.

**2. The interest of justice warranting relief arises from the compelling mitigation case recently revealed, thus demonstrating the ineffectiveness of counsel case to be “substantial,” as required by *Martinez*.**

The claim for which Petitioner seeks “cause” excuse under *Martinez* was trial counsel’s total failure to develop a mitigation case. *Martinez v. Ryan*, No. 10-1001 (U.S. March 20, 2012) adopts an equitable rule requiring a prisoner to “demonstrate 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.” Slip. Op. p. 11. While ultimately it is for the lower courts to determine if a claim is “substantial,” as was directed in *Martinez*, consideration of the substantiality of that claim is appropriate here, because it demonstrates that the grant of an out-of-time petition for rehearing is supported by a strong “interest of justice.”

The underlying certiorari petition and reply demonstrate that the ineffectiveness itself is established. No effort whatever was made by trial counsel to determine whether sufficient mitigating circumstances existed to justify a life sentence. Now, however, the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984) is demonstrably substantial. In connection with clemency proceedings and a 2010 state post-conviction proceeding, the following mitigation evidence has become evident:

**A. Cook's Infancy and Childhood.** Wanda Meadows, at age seventeen, married a drug addict and alcoholic named Gordon Cook. They had a daughter named Debrah. Eleven months later, in 1961, Wanda gave premature birth to Cook.<sup>2</sup>

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.<sup>3</sup> Cook's mother was a "predator and sex abuser," mentally ill, and a "prescription pill junkie."<sup>4</sup> A counselor reported he had "never talked to a colder, more heartless person in his many years of social work."<sup>5</sup>

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. Cook and Debrah were neglected and repeatedly abused by their grandparents, both physically and sexually.<sup>6</sup>

Their step-grandfather Jim repeatedly sexually abused Cook and Debrah, and also

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<sup>2</sup> Ex. 7 to Arizona Superior Court Petition for Post-Conviction Relief, November 22, 2010, ¶¶ 4, 6, 8, 9. 8. (Part of record in No. 10-9742) (Hereinafter "PCR Ex.")

<sup>3</sup> *Id.*, ¶ 9.

<sup>4</sup> *Id.*, ¶ 17; PCR Ex. 4, ¶ 5; Ex.7 to Petition for Clemency, March 25, 2011, ¶ 4. (Hereinafter "Clemency Ex.") 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.

<sup>5</sup> Wyoming State Hospital Records, 1980-81, Clemency Ex. 40 at p. 26.

<sup>6</sup> PCR Ex. 7, ¶ 10; PCR Ex. 8, ¶ 8; Declaration of Donna Schwartz-Watts, M.D., PCR Ex. 3, ¶¶ 18-19.



forced them to have sex with each other at very young ages.<sup>7</sup> 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.<sup>8</sup>

Cook and his sister also suffered physical abuse and neglect by their grandparents. As punishment, Cook and his sister would be tied to chairs.<sup>9</sup> 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.<sup>10</sup>

While Cook and Debrah were living with their grandparents, Wanda would occasionally visit them. When she did, she would sometimes beat her young son and then fondle him to "make him feel better."<sup>11</sup> 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.<sup>12</sup> He was controlling and abusive.<sup>13</sup> Wanda moved to California with her new husband and new family, but left Cook and his sister behind in Chicago with their abusive grandparents.<sup>14</sup> When Cook was nine, his grandmother Mae died. Only then, after four years of abuse and neglect, were Cook and his sister sent to

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<sup>7</sup> PCR Ex. 1, ¶ 18; PCR Ex. 8 ¶ 8; PCR Ex. 7 ¶ 10.

<sup>8</sup> PCR Ex. 1, ¶ 18.

<sup>9</sup> PCR Ex. 7, ¶ 10; PCR Ex. 1 ¶ 19.

<sup>10</sup> PCR Ex. 8, ¶ 7.

<sup>11</sup> PCR Ex. 1, ¶ 21.

<sup>12</sup> PCR Ex. 8, ¶ 9; PCR Ex. 7, ¶ 13; Letter from Patricia Golembieski, Clemency Ex.26.

<sup>13</sup> Clemency Ex.7, ¶ 6.

<sup>14</sup> PCR Ex. 7, ¶ 13.

California to live with their mother Wanda and her new family.<sup>15</sup>

Escaping his grandparents did little to improve life for Cook or Debrah. Their stepfather believed “they had bad genes or were from bad seed.”<sup>16</sup> They were treated as outcasts.<sup>17</sup> Cook’s stepfather was vicious with a belt, beat Cook, and yelled at him regularly.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> Wanda sexually abused one of her stepsons.<sup>22</sup> Cook’s sister and stepsister were sexually abused by their stepbrothers.<sup>23</sup> Cook’s stepfather asked his own daughter, Cook’s stepsister, to have sex with him.<sup>24</sup>

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.<sup>25</sup> While Cook was growing up, she attempted suicide on numerous occasions.<sup>26</sup> 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

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<sup>15</sup> PCR Ex. 1, ¶ 22; PCR Ex.8 ¶ 9.

<sup>16</sup> Clemency Ex. 26.

<sup>17</sup> Clemency Ex. 26; PCR Ex. 8, ¶ 10; PCR Ex. 7, ¶ 13.

<sup>18</sup> PCR Ex. 8, ¶¶ 10, 13; PCR Ex. 7, ¶ 13.

<sup>19</sup> Clemency Ex. 7, ¶ 6.

<sup>20</sup> PCR Ex. 8, ¶ 13.

<sup>21</sup> PCR Ex. 1, ¶ 27.

<sup>22</sup> Clemency Ex. 7, ¶ 5.

<sup>23</sup> PCR Ex. 8, ¶ 17.

<sup>24</sup> Clemency Ex. 26.

<sup>25</sup> PCR Ex. 8, ¶ 5; PCR Ex. 7, ¶ 17.

<sup>26</sup> PCR Ex. 1, ¶ 28; PCR Ex. 8, ¶ 11.

suicide attempts, Cook's stepfather would blame Cook and his sister, telling them it was their fault that their mother wanted to kill herself.<sup>27</sup>

When he was not quite fifteen, Cook's mother gave custody of him to the State of California.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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."<sup>32</sup> Bennett admits to masturbating Cook and having him perform oral sex.<sup>33</sup> At McKinley, there was a "peek-a-boo room" which was used for "time outs."<sup>34</sup> 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.<sup>35</sup> Cook was forced to spend time in the "peek-a-boo room," naked and handcuffed to the bed, while Bennett would

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<sup>27</sup> PCR Ex. 1, ¶ 28; PCR Ex. 8, ¶ 11.

<sup>28</sup> Declaration of Wanda Dunn, PCR Ex. 5, ¶ 14; McKinley Children Center Records, 1976-77, Clemency Ex. 45.

<sup>29</sup> Clemency Ex. 8, ¶ 7.

<sup>30</sup> Clemency Ex. 45.

<sup>31</sup> Declaration of Howard Smith Bennett, Clemency Ex. 19, ¶ 5.

<sup>32</sup> *Id.*, ¶ 6.

<sup>33</sup> *Id.*, ¶ 6.

<sup>34</sup> Declaration of David Overholt, Clemency Ex. 17.

<sup>35</sup> The administrator during Cook's time at McKinley was dismissed after allegations regarding sexual misconduct arose.



sexually abuse him.<sup>36</sup> Cook was even circumcised at age fifteen,<sup>37</sup> at the instruction of Bennett. Unsurprisingly, Bennett is now a registered sex offender in California,<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> Cook ran away from McKinley on several occasions.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> After leaving McKinley at age sixteen, Cook spent his last two years as a child going from one group home to another.<sup>44</sup> Even though Cook had

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<sup>36</sup> PCR Ex. 1, ¶ 30.

<sup>37</sup> Clemency Ex. 45.

<sup>38</sup> *California v. Bennett*, State of California Department of Justice, *Megan’s Law Homepage*, Photograph of Howard Bennett, Clemency Ex. as Ex. 21.

<sup>39</sup> “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), Clemency Ex. 20.

<sup>40</sup> PCR Ex. 1, ¶ 31.

<sup>41</sup> Clemency Ex. 45.

<sup>42</sup> PCR Ex. 1, ¶ 31.

<sup>43</sup> Clemency Ex. 45.

<sup>44</sup> School records indicate that Cook lived with one group parent named Arlis Benton (now deceased) and another named Margaret Hayes. School Records, 1977-79, Clemency Ex. 53. Because the State of California lost his records, the number of other facilities in which Cook resided is unclear. Clemency Ex. 18.

escaped McKinley, he still did not escape his abuser. Bennett tracked him down at another group home and met with him.<sup>45</sup> 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.<sup>46</sup> Tom Maas, who has fostered over fifty children, says that Cook was one of his “top kids.”<sup>47</sup> Lisa Maas loved Cook very much and knew that his childhood was “a nightmare.”<sup>48</sup> Cook excelled in the structured environment of the group home.<sup>49</sup> He had a dry sense of humor, and loved nature and photography.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup>

**B. 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

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<sup>45</sup> Clemency Ex. 19, ¶ 7.

<sup>46</sup> PCR Ex. 1, ¶ 36.

<sup>47</sup> Declaration of Thomas Monroe Maas, Clemency Ex. 9, ¶ 4.

<sup>48</sup> Letter to the Clemency Board from Lisa Maas, Clemency Ex. 22.

<sup>49</sup> Clemency Ex. 9, ¶ 4.

<sup>50</sup> *Id.*, ¶ 5.

<sup>51</sup> Clemency Ex. 8, ¶ 7.

<sup>52</sup> PCR Ex. 1, ¶ 37; Clemency Ex. 10, ¶¶ 12-13.



he lacked the ability “to adjust to the stress of military life, as evidenced by [his] . . . self-inflicted injury.”<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup> Within a year, Cook moved and was living in Wyoming, where he again attempted suicide.<sup>56</sup> 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.”<sup>57</sup>

During that time, Cook had “many ups and downs”; at times, he would be “very impulsive, act[ing] without thinking.” Cook “relied very heavily on friends and [their] approval.” Cook eventually left the hospital against professional advice and, on a quest to be loved, became involved with a hospital staff member. Unable to cope, he

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<sup>53</sup> Army Records, 1979-80, Clemency Ex. 41.

<sup>54</sup> Wyoming State Hospital Records, Clemency Ex. 40; Idaho State Hospital Records, 1981-82, Clemency Ex. 39; Clemency Ex. 10, ¶ 17.

<sup>55</sup> Clemency Ex. 10, ¶ 17.

<sup>56</sup> Clemency Ex. 40.

<sup>57</sup> Clemency Ex. 39.

voluntarily reentered the state hospital only a few days later, after yet another attempted suicide by overdosing on pills. At the end of March 1983, after having been in the hospital for only one week, Cook left.<sup>58</sup>

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.<sup>59</sup> 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."<sup>60</sup> Between 1983 and 1987, Cook was regularly seen by mental health professionals for various reasons, including depression, acute psychosis, and alcoholism.<sup>61</sup>

Because of his mental health issues, Cook had a hard time keeping a job.<sup>62</sup> Once, Patti saw Cook living under a bridge, filthy and hungry.<sup>63</sup> She describes Cook as "a beaten, broken individual—it was as if you took the spirit out of a dog."<sup>64</sup> Cook lived a very sad life.<sup>65</sup>

In 1986, Cook met and developed a relationship with a woman named Barbara and her two children. 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

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<sup>58</sup> *Id.*

<sup>59</sup> Clemency Ex. 11, ¶ 4.

<sup>60</sup> *Id.*, ¶ 5.

<sup>61</sup> Report of Eugene R. Almer, M.D., 1987, Superior Court Record, *State v. Cook*, at 6; Report of B. Anthony Dvorak, M.D., F.A.C.S., 1987, Superior Court Record, *State v. Cook*, at 1.

<sup>62</sup> Clemency Ex. 11, ¶ 6.

<sup>63</sup> *Id.*, ¶ 7.

<sup>64</sup> *Id.*, ¶ 2.

<sup>65</sup> *Id.*, ¶ 8.

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.<sup>66</sup>

Unfortunately for Cook, the relationship with Barbara did not last. It came to an end in March 1987. 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.<sup>67</sup> 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.”<sup>68</sup>

**C. The Crime.** After quitting his job, Cook went home to the apartment he shared with his co-defendant and one of the victims. Feeling hopeless, Cook began to drink himself into numbness and to smoke away the pain.<sup>69</sup> A normal, well-adjusted person could cope with no longer having a job or a significant other; but for Cook, the devastation was unmanageable, and he snapped. What started as a plan to steal a few dollars from his roommate turned into a tragedy for the victims.

Intoxicated on drugs and alcohol, and aided by his codefendant and roommate John Matzke, Cook was responsible for two deaths. While there is no denying the tragic reality of the brutal crime, Cook does not have any specific recollection of the crime for which he is sentenced to death.<sup>70</sup> Matzke, however, provided a statement to the police

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<sup>66</sup> Telephone interview, Mar. 21, 2009 (no transcript available), reported in Clemency Petition.

<sup>67</sup> Ex. 43, at 4.

<sup>68</sup> Report of Eugene R. Almer, M.D, 1987, Superior Court Record, *State v. Cook*, at 3.

<sup>69</sup> Psychological Evaluation of John Matzke, Daniel W. Wynkoop, Ed.D., Ex. Clemency Ex.35 at 4.

<sup>70</sup> Report of Eugene R. Almer, M.D, 1987, Superior Court Record, *State v. Cook*, at 5.



and “was extremely descriptive regarding the events” surrounding the crime.<sup>71</sup>

During the evening of July 19, 1987, into the early morning of July 20, 1987, Cook disassociated from reality. He suffered from amphetamine delusional disorder at the time of the crime, caused by his use of crystal methamphetamine.<sup>72</sup> According to Matzke, Cook appeared “crazy,” with a “crooked smile,” and he was “drooling.”<sup>73</sup> Matzke also said that Cook accused Cruz-Ramos of being a spy, and made references to the CIA and Oliver North. Cook kept asking Cruz-Ramos to take him to his leader. These persecutory statements were not reality based; they were a symptom of Cook’s psychotic state.<sup>74</sup> When Cook was sentenced to death for two concededly horrific murders, none of this also-horrific life history was presented to the judge for consideration as mitigation.

### CONCLUSION

The writ of *certiorari* should be granted, the judgment below vacated, and the case remanded to the Ninth Circuit for further consideration in light of *Martinez, supra*.

Respectfully Submitted.



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<sup>71</sup> Psychological Evaluation of John Matzke, Daniel W. Wynkoop, Ed.D., Clemency Ex.35 at 3.

<sup>72</sup> PCR Ex. 1, ¶ 92.

<sup>73</sup> Interview of John Matzke, December 17, 1987, Clemency Ex. 36 at 41.

<sup>74</sup> PCR Ex. 1, ¶ 92.

### **CERTIFICATE OF COUNSEL**

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

  
Michael J. Meehan, counsel for Petitioner