No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2008

DANIEL WAYNE COOK,

Petitioner,

v.

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(CAPITAL CASE)

1. Whether the Arizona Court unreasonably applied this Court's clearly settled precedent, from *Lockett v. Ohio*, 438 U.S. 586 (1978) to *Penry v. Lynaugh*, 492 U.S. 302 (1989), in refusing to consider family background, mental health, and substance abuse issues in the capital sentencing of Petitioner because no nexus between the offense and such evidence was shown to exist.

2. Counsel for Petitioner in the Arizona trial-level post-conviction review proceeding failed to exhaust ineffective assistance of counsel claims. The claims therefore could not be presented to the Arizona Supreme Court for consideration. The question is whether such ineffectiveness by post-conviction trial counsel was "cause" excusing Petitioner's failure to exhaust the issues, on at least one of the following grounds:

    a) Petitioner was entitled to counsel in Arizona Superior Court post-conviction proceedings, since only there could Petitioner raise the unexhausted claims, or because that proceeding represents Petitioner's "first appeal" for the claims, i.e., the issue reserved by this Court in *Coleman v. Thompson*, 501 U.S. 722, 755, 756 (1991);

    b) Petitioner in a capital case is entitled, under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, to counsel at all stages of a State post-conviction proceeding necessary to fulfill the exhaustion requirements of the AEDPA and precedent from this Court before a federal issue may be raised in federal *habeas corpus*; or

    c) Because, under 28 U.S.C.S. 2254(b)(1)(B)(ii) such ineffectiveness fulfills the requirement of that statute that "circumstances exist that render such process ineffective to protect the rights of the applicant."

3. Whether Petitioner's presentation to the Arizona Supreme Court of a claim couched in state law terms, that the trial court judge was biased, "fairly presented" his federal claim because the claim is "functionally equivalent" or "identical" to its federal law counterpart, *i.e.,* the question reserved by this Court in *Baldwin v. Reese*, 541 U.S. 27 (2004).

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Daniel Wayne Cook, an Arizona inmate under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit rejecting his claims for habeas corpus relief.

OPINIONS BELOW

The amended opinion of the Ninth Circuit denying relief is reported at 538 F.3d 1000 (9th Cir. 2008), and is Appendix A hereto. The Ninth Circuit Order granting a certificate of appealability is Appendix B hereto. The orders of the United States District Court for the District of Arizona denying habeas corpus and granting a certificate of appealability may be found at 2006 U.S. Dist. LEXIS 14523 and 14525 (D. Ariz. March 28, 2006) and are Appendix C

hereto. The opinion of the Arizona Supreme Court affirming Petitioner's conviction and sentence on direct appeal is reported at 170 Ariz. 40, 821 P.2d 731 (1991) and is Appendix D hereto.

JURISDICTION

The amended opinion of the United States Court of Appeals for the Ninth Circuit was issued on August 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution are set forth in Appendix E. The pertinent provisions of 28 U.S.C. § 2254(b) are set forth in Appendix F

STATEMENT OF THE CASE

Petitioner Daniel Cook was given two death sentences by the Arizona Superior Court for the 1987 murders of two men in an apartment occupied by Cook and one John Matzke in Lake Havasu City, Arizona. This case presents an all-too-common picture of a capital prosecution beset by incompetency and callous administration: 1) Petitioner had a dreadful family history, suffered mental problems and was gripped by substance addiction, but none of that was considered for sentencing by the Arizona Courts; 2) Petitioner was appointed a lawyer known by the appointing judge to be incompetent, who performed so badly that Petitioner ultimately, in desperation, chose to represent himself at trial; 3) Petitioner's appellate

lawyer was so ineffective that he did not raise a serious and obvious sentencing issue involving Petitioner's mental health[1] nor did he present as a federal claim exclusion of evidence of intoxication, a simple and compelling claim; and 4) Petitioner's post conviction lawyer failed to perform a simple but essential step to exhaust the above claims. A criminal rule that he knew applied required him to include the issues in a motion for rehearing to the post conviction trial court, in order to exhaust them in the Arizona Supreme Court. He did not do so.

There is another issue, less common to capital cases but very significant. An accomplice, John Matzke, testified that Petitioner had substantial – indeed shocking – involvement in the crimes. The testimony was obtained through a plea bargain which required the accomplice to testify consistently with an original, drunken confession. If he did not, the state could withdraw the accomplice plea under the threat from the judge before whom he testified and who presided over Petitioner's case, that if that happened, Matzke faced a certain death sentence.[2] Such "consistency plea" agreements had been disapproved by the Arizona Supreme Court[3] and have

[1] *Ake v. Oklahoma,* 470 U.S. 68 (1985)

[2] The written plea agreement with Matzke stipulated that "The making by John Eugene Matzke of two or more statements during such testimony or interviews which are inconsistent, so that at least one of them must be false, will be considered a violation of this Agreement without the State being required to establish which statement was false." Excerpt of Record in Ninth Circuit 1, Stipulated Guilty Plea and Agreement, ¶ 3 (Hereinafter "Exc."). Both Matzke and his lawyer testified at post conviction proceedings they knew that meant he had to stick to the story he told in his drunken confession, and if he did not he was likely to be sentenced to death. Exc. 24 pp. 116 – 127.

[3] *State v. Fisher,* 141 Ariz. 227, 244, 686 P.2d 750, 767 (1984)(plea agreement "unusual if not unethical"); *State v. Fisher,* 176 Ariz. 69, 859 P.2d 179 (1993)(plea agreement

been held to be a violation of due process by many courts.[4] But the trial judge both inserted himself into the process of impressing upon Matzke that it was essential that he not change his story at Petitioner's trial, under fear of a death sentence,[5] and found no problem with the plea bargain or his role in it, at the post conviction proceeding in Petitioner's case.[6] In the Arizona courts, Petitioner raised the claim of bias of the trial judge, exhausting it in the Arizona Supreme Court. He couched the due process issue of judge bias in state law terms, thus raising Question 3. here – fair presentation of a federal claim by asserting an identical state law claim.

A. The Sentencing Court failed to consider any non-statutory mitigating factors. The sentencing Court found the existence of all the aggravators requested by the state. Exc. 39 at 14-15. The Court found no evidence of the statutory mitigating factor related to impaired capacity to appreciate the wrongfulness of the conduct; and found no other statutory mitigating factors.

Turning to non-statutory mitigation, the sentencing judge refused to find Cook's mental history to be a mitigating factor, commenting that there was "no connection" between that history and the crime. *Id.* at 19, 20. With that conclusion, the sentencing judge ignored extensive mitigation evidence.

"unenforceable").

[4] *E.g. People v. Boyer,* 38 Cal.4th 412, 133 P.2d 581 (2006); *Sheriff, Humboldt County v. Acuna,* 107 Nev. 664, 819 P.2d 197 (2000) . *Cf. Mooney v. Holohan,* 294 U.S. 103, 112 (1935) (due process violation if obtain conviction "through intimidation").

[5] "I would have no hesitation in giving you [accomplice Matzke] the death penalty." Exc. 43 pp 80, 81.

[6] Exc. 25 p. 33.

Petitioner was 26 years old at the time of his arrest. From about age 14 into his twenties, he was in a dysfunctional, blended family, was in and out of a "boys' home" in California, a "youth home" in Lancaster, California, a "foster home in Newhall, California," and with his parents in Lake Havasu City, Arizona (the city where he resided in 1987, and the crimes occurred) for two weeks when he was 17. Exc. 3, Psychiatric Evaluation of Dr. Eugene Almer, p. 2. Thereafter he was shuttled back and forth between family friends in Idaho and Utah. *Ibid.*

Petitioner had been sporadically employed, working for weeks at a time at jobs such as school groundskeeper, forestry department worker, and cobalt mine worker. He also was unemployed for extended periods of time. *Ibid.*

At age 21 or 22, Petitioner moved back to Arizona. For four years he lived in the desert between Lake Havasu City (the town where the crimes were committed) and Kingman (the County Seat, where Cook was tried.) *Ibid.* He wasn't able to keep work, and often ended up being arrested and jailed because of behavior secondary to his alcohol problems. *Ibid.*

Petitioner's "Drug history reveals that he started heavily using alcohol at the age of 14, marijuana at of 15, barbiturates at 16, hallucinogenics at 17, and amphetamines at age 25." *Ibid.*

Petitioner had an extensive record of institutional contacts. While in Idaho he underwent detox treatment for alcohol. *Ibid.* At age 19 he spent

five months in a Wyoming hospital being treated for anxiety, depression, suicidal attempts, and drugs. *Ibid.* Later he ended up in a state hospital in Idaho. *Ibid.*

Cook also had indications of organic brain injury. Two years before the crimes an antagonist in a fight backed his car over Cook's head, rendering him unconscious for nine hours and putting him in the Kingman, Arizona hospital for six days. *Id.* at p. 3.

B. On Direct Appeal Petitioner's counsel failed to assert federal claims. In his direct appeal to the Arizona Supreme Court, Cook's appointed counsel failed to claim error by the trial judge in refusing Cook a mental examination for sentencing purposes. Particularly in light of evident problems, this constituted a failure to exhaust a clearly meritorious claim that the state court had violated *Ake v. Oklahoma,* 470 U.S. 68 (1985).

Appellate counsel also failed properly to assert as a federal claim the trial court's preclusion of any evidence that Petitioner was intoxicated at the time of the crime. Such evidence was clearly relevant to the issue of whether Petitioner had acted with "intent." [7] And it was extensive.

There was considerable evidence that didn't come out at the trial that both Petitioner and his accomplice, Matzke, had consumed massive

[7] The state had successfully sought to preclude such evidence by choosing to proceed under that portion of Arizona's murder statute which permitted conviction for "knowingly" rather than "intentionally" causing death. Ariz. Rev. Stat. Ann. § 13-1105(A)(1). Because Ariz. Rev. Stat. Ann. § 13-503 prohibited consideration of intoxication where "knowingly" doing an act is punishable, the state prevailed on its motion. However, the state also sought to convict Petitioner as an accomplice. An element of the offense of an accomplice is acting intentionally. Ariz. Rev. Stat. Ann. § 13-301. This made intoxication evidence admissible.

quantities of alcohol and drugs. Matzke testified at the post conviction hearing that he and Petitioner had consumed prodigious amounts of beer, and added drugs to the mix, during the weekend when the victims were killed. He said that on the way home before anything happened, he bought a case of beer. He and Cook each drank ten beers. Exc. 24, Tr. December 2, 1994 p. 130, ll. 12 – 22. At the same time, they shared three or four "joints." *Id.* l 24 – p. 131 l. 3. Moreover, Matzke also saw Cook use crystal meth. *Id.* p. 131 ll. 4,5. and drink "some rum or vodka." *Id.* ll. 6 – 8. This cycle was repeated with another case of beer, more joints and crystal meth. *Id.* ll. 9 – 24; p. 131 l. 25 – 132 l. 1. Between killings, they split at least two more cases of beer, and probably more marijuana. *Id.* p. 132 l. 2 – 133 l. 3.

Petitioner's appellate counsel could and should have contested the preclusion of this evidence as a federal claim under. Because he did not, the claim was not exhausted.

Post conviction counsel would raise these failings by appellate counsel as constitutional ineffectiveness, thus constituting "cause" for failure to exhaust. But post conviction counsel, himself, did so ineffectively, thus failing to exhaust *that* claim.

C. <u>On direct Appeal, the Arizona Supreme Court perpetuated the error of refusing mitigation because it was not causally linked to the crime.</u> The Arizona Supreme Court rejected Petitioner's challenge to the sentencing judge's failure to consider his family background, mental health and

substance abuse history as non-statutory mitigation. The Court explicitly recognized that the trial court had concluded that:

> " 'I simply do not find there to be any connection between any of these prior mental problems and the offenses that were committed in this case' ". 170 Ariz. at 64, 821 P.2d at 755.

The Court expressly approved of this rejection of Petitioner's non-statutory mitigation evidence:

> " We are satisfied from the record that the trial judge's consideration of the evidence of Cook's mental history was sufficient to have identified any independent mitigating circumstance weighing in favor of leniency." *Ibid.*

Then the Court recited that it, also, had done its own "independent review of the record," and found no mitigating circumstance sufficient to call for leniency. *Ibid.* However, at the time of its opinion in Petitioner's case, the Arizona Supreme Court had long required that to be a mitigating factor, evidence of troubled history or mental health must have a "nexus" to the crime. *See e.g. State v. Wood,* 180 Ariz. 53, 72, 881 P.2d 1158 (1994); *State v. Brewer,* 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989); *State v. Vickers,* 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981).[8] That is why the Court could – and did – conclude that there were *no* mitigating factors, in the face of the facts previously

[8] Additionally, in an opinion in 2000 the Arizona Supreme Court discussed at length the reasons for its insistence upon a "nexus," citing numerous cases both before and after its opinion in Petitioner's case. *State v. Hoskins,* 199 Ariz. 127, 151, 14 P.3d 997, 1021 (2000)(family dysfunction or mental impairment "can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts. *We reaffirm that doctrine here.*"(emphasis supplied))

described herein setting forth Petitioner's dreadful family history, mental and addiction problems.

D. Petitioner's post conviction counsel failed to include ineffectiveness of counsel issues in a motion for rehearing to the trial court, which precluded review of them by the Arizona Supreme court, and made them unexhausted for federal habeas corpus. Cook's post conviction counsel filed a motion for rehearing, and after its denial, a Petition for Review. However, he failed to include as issues in the motion for rehearing: a) the ineffectiveness of trial counsel in failing to prepare any defense for guilt or sentencing phases; and b) the ineffectiveness of appellate counsel in failing to present as a federal claim the trial court refusal to allow evidence of intoxication and Petitioner's request for a mental health examination for sentencing. Under Arizona Rules of Criminal Procedure applicable to Petitioner's case, this omission prevented these issues from review by the Arizona Supreme Court.[9]

There was an extensive record developed at the post conviction hearing that the trial judge in this small town of about 20,000 people had known he was appointing an incompetent lawyer for petitioner,[10] and was aware that lawyer had substance abuse problems.[11] Even the prosecutor knew this.[12]

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[9] *See*, opinion below, 538 F.3d at 1026, 1027, App. A p. 38. As the District Court found, Exc. 40 p. 11, "In *State v. Bortz,* 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991), under former Rule 32.9 [Ariz. R. Crim.P; the former version being applicable to Petitioner's case because of when he had filed his petition for post conviction relief] the court held that only claims preserved in a motion for rehearing following denial of post-conviction relief by the trial court may be reviewed on appeal."

[10] Exc. 24 pp. 28 – 34; 43 – 45; 66 l. 19 – 67 l. 9.

[11] Exc. 24 p. 31 ll, 7 – 16.

[12] Exc. 22, Affidavit Eric Larsen 5 October, 1994.

The developed record also showed that the defense lawyer did virtually nothing to prepare a defense, for either guilt or punishment phases.[13] He made no progress at all in even formulating a defense,[14] and within weeks of the trial, the lawyer was focused only on a "diminished capacity" defense, which does not exist in Arizona.[15] Post conviction counsel's failure to exhaust this claim in his motion for rehearing was inexplicable.

E. *Habeas Corpus* proceedings in the District Court. Cook filed a petition for writ of *habeas corpus* in 1997. As such, his petition was governed by the provisions of the Antiterrorism and Effective Death Penalty Act, particularly 28 U.S.C. § 2254(b), (d), (e) and (f). The District Court's jurisdiction arose from 28 U.S.C. §§ 2241 and 2254. The District Court first made certain preliminary rulings on issues of preclusion and discovery. The Court thereafter denied the petition with prejudice on March 28, 2006 and contemporaneously issued a certificate of appealability on March 28, 2006, for some, but not all, of Cook's claims. Exc. 40, App. C. Cook timely appealed. Exc. 42.

F. Ninth Circuit Appeal. The Ninth Circuit's jurisdiction arose from 28 U.S.C. § 2253. At the briefing stage, the Ninth Circuit expanded the certificate of appealability, pursuant to its Ninth Circuit Rule 22-1 (e) and (f). *See* Appendix B. Each issue presented here was included in either the District Court certificate of appealability, or that of the Ninth Circuit.

[13] Exc. 24 pp. 55; 106; 112l 147 – 48.
[14] Exc. 24 pp. 142 – 146.
[15] Exc. 24 p. 58.

The Ninth Circuit issued a panel opinion which denied petitioner all relief, affirming the judgment of the District Court.

Rejecting Petitioner's claim of state court error for failure to consider mitigation evidence that lacked a "nexus" to the crime, the Ninth Circuit focused entirely upon the action of the Arizona Supreme Court, affirming on the basis of the Arizona Supreme Court's statement that, after conducting its own independent review, that Court did "not believe that Cook's mental history demands or even justifies leniency, especially when balanced against the aggravating factors . . ." 538 F.3d at 1030, App. A. pp. 44, 45.

The Ninth Circuit also affirmed the District Court's rejection of Petitioner's claims of ineffective assistance of trial and direct appellate counsel, holding that Petitioner's post conviction counsel's failure to pursue these claims was not "cause" to excuse full exhaustion. The Ninth Circuit held that Petitioner simply did not have a constitutional right to counsel in post conviction proceedings, citing *Pennsylvania v. Finley,* 481 U.S. 551, 556 (1987). 538 F.3d at 1027, App. A p. 39. It held that Petitioner had no right to counsel at the stage of filing a motion for rehearing in the trial court post conviction case. It rested this holding on a flat statement that there was no constitutional right to counsel at the rehearing stage in the trial court, citing *Coleman v. Thompson,* 501 U.S. 722, 752 (1991), and citing *State v. Smith,* 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996), not a capital case, which decided a matter of state law. *Ibid.*

Finally, the Ninth Circuit rejected Petitioner's claim that the trial judge should have recused himself, stating that for Petitioner to raise a "somewhat similar" claim in state court terms was insufficient, citing *Duncan v. Henry,* 513 U.S. 364, 366 (1995). The Court did not discuss or determine Petitioner's argument that the Arizona rule on judicial bias was not just "somewhat similar," but virtually identical to the federal rule, and that as such it should have been recognized as sufficient, a question recognized but reserved by this Court in *Duncan, supra,* and *Baldwin v. Reese,* 541 U.S. 27, 33 – 34 (2004). *See,* Petitioner's Ninth Circuit opening brief, pp. 59 – 64.

REASONS FOR GRANTING THE WRIT

This case merits review because the Arizona Supreme Court decided the mitigation sentencing issue in a manner conflicting with this Court's well-developed mitigation jurisprudence, and the Ninth Circuit perpetuated that conflict. Rule 10(b). It also presents important issues of federal law about the right to counsel in state post conviction proceedings, and what constitutes "fair presentation" of a federal issue to a state court, that this Court has not, but should, resolve. Rule 10(c).

I
ARIZONA'S REQUIREMENT THAT MITIGATION CANNOT BE CONSIDERED UNLESS IT IS CAUSALLY RELATED TO THE CRIME CONFLICTS WITH THE *LOCKETT* LINE OF PRECEDENT.

This case warrants review because it represents both Arizona's determination of Petitioner's mitigation claim in a manner contrary to the *Lockett* rule, and that of the Ninth Circuit.

The requirement that a sentencing court must be permitted to consider *any* information about the character, record, family circumstances or mental health of the accused as possible mitigation against a death sentence was well established by the time the Arizona Supreme Court affirmed Petitioner's conviction in 1992. *Lockett v. Ohio,* 438 U.S. 586 (1978)(plurality); *Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Skipper v. South Carolina,* 476 U.S. 1 (1986); *Hitchcock v. Dugger,* 481 U.S. 393 (1987); *South Carolina v. Gathers,* 490 U.S. 805 (1989).[16]

The *Lockett* rule arose as an important accommodation of the tension between *Furman v. Georgia,* 408 U.S. 238 (1972) and *Woodson v. North Carolina,* 428 U.S. 280 (1976) and its companion cases.[17] While *Furman* held that completely arbitrary, standardless imposition of death sentences violated the Eighth Amendment, the holdings in *Woodson, Profitt and Jurek* turned upon the importance of mitigation personal to the accused, and not tied to the crime. *Woodson*'s mandatory death sentence regime in North Carolina violated the Eighth Amendment because of its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson, supra,* 428 U.S. at 303. On the other hand, the systems in

[16] These cases are the more significant for this case than newer cases, which continue and emphasize the importance of the *Lockett* rule, because this case, falling under the AEDPA, 22 U.S.C. § 2254(d)(1), involves a state court decision that was "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" at the time of Petitioner's direct appeal in 1992. This case is nonetheless important, because there continue to be large numbers of capital *habeas corpus* cases pending, for which this Court's *Lockett* jurisprudence would provide important guidance.
[17] *Proffitt v. Florida,* 428 U.S. 242 (1976) and *Jurek v. Texas,* 428 U.S. 262 1976).

Profitt and *Jurek* survived because, as this Court said, "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." 428 U.S. at 276.

The Arizona Supreme Court established a policy completely conflicting with the *Lockett* doctrine. This has not been an inadvertent or casual matter. In 1989, three years before deciding Petitioner's appeal, the Arizona Supreme Court, in a case it has repeatedly cited in subsequent cases,[18] said:

> "A difficult family background, in and of itself, is not a mitigating circumstance. . . . A difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control. . . . Appellant, however, made no claim that his family background had anything to do with the murders he committed. Thus, we find no error." *State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989).

In an opinion issued just seven days after the Arizona Supreme Court denied Petitioner's motion for rehearing on direct appeal in this case, the Court said:

> "The evidence of defendant's troubled background establishes only that a personality disorder exists. It does not prove that, at the time of the crime, the disorder controlled defendant's conduct or impaired his mental capacity to such a degree that lenience is required. *Compare* [State v.] *Vickers,* 129 Ariz. [506]

[18] *E.g. State v. Wood,* 180 Ariz. 53, 72, 881 P.2d 1158, 1177 (1994)("Defendant failed, moreover, to demonstrate how his allegedly poor upbringing related in any way to the murders. *See State v. Wallace . . .); State v. Walden,* 183 Ariz. 595, 620, 905 P.2d 974, 999 (1995)(Defendant "does not explain how [background of alcoholism] had anything at all to do with th rapes and the murder. [It] is not a mitigating circumstance."[citing *Wallace.*]).

> at 516, 633 P.2d [315] at 325 [1981](record showed that a character disorder existed, but not that it impaired mental capacity or influenced behavior), *with* [State v.] *Doss*, 116 Ariz. [156] at 159,163, 633 P.2d [1054] at 1057, 1059 [1977](evidence showed that defendant's epilepsy, abnormal mentald condition, and serious personality disorder were substantial factors in causing the crime.)" *State v. Brewer,* 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992).

The Arizona Supreme Court has been quite clear about its insistence upon a "nexus" requirement. *E.g. State v. Styers,* 177 Ariz. 104, 865 P.2d 765 (1993)(refusing to consider PTSD because doctors could not connect it to his behavior at time of crime);[19] *State v. Jones,* 185 Ariz. 471, 490, 491, 917 P.2d 200, 219 – 20 (1996)("trial court did not find any connection between defendant's family background and his conduct on the night of the murders, and our review of the record does not reveal any such connection. Thus, we find that defendant's chaotic and abusive childhood is not a mitigating circumstance").

The Arizona Supreme Court followed its nexus doctrine in Petitioner's case. Contrary to the Ninth Circuit's opinion, the Arizona Supreme Court did not make a reasonable determination that the trial court record supported a correct application of this Court's *Lockett* doctrine. The trial court here explicitly required a nexus. It refused to give any consideration to Petitioner's prior mental problems, saying "I simply do not find there to be any connection between any of these prior mental problems and the offenses that were committed in this case. . . ." Exc. 29, pp. 19, 20. This was contrary

[19] This holding was found to be contrary to this Court's mitigation precedent in *Styers v. Schriro,* 2008 U.S. App. LEXIS 22054 (9th Cir. 2008)

to this Court's *Lockett* rule cases. The Arizona Supreme Court made the same "contrary" determination.

The Arizona Supreme Court quoted the above conclusion by the sentencing judge in its opinion, 170 Ariz. at 64, 821 P.2d at 755. It then held that it was "satisfied" that the trial judge's "consideration of Cook's mental condition was sufficient to have identified any independent [i.e. non-statutory] mitigating circumstance weighing in favor of leniency." *Ibid.* But of course the trial court had concluded that Petitioner's mental condition was not a mitigating circumstance that could be considered. That the Arizona Supreme Court then went on to do its own "independent review of the record," and found no mitigating circumstance sufficient to call for leniency, was not an application of the principles of *Lockett*. The Supreme Court had already agreed with the trial court that the significant mitigation about Petitioner's chaotic family upbringing, mental problems and major substance abuse, did not qualify for consideration. It was "weighing" what was left, which was basically nothing. That is clear from the opinion itself. It is made even more clear by the myriad of cases which the Arizona Supreme Court had issued, strongly requiring a "nexus," before, contemporaneously with, and after its opinion in Petitioner's case.

The Ninth Circuit decision concluding that the Arizona Supreme Court had engaged in "weighing" of *Lockett*-type mitigation evidence is mistaken. Its holding conflicts with other Ninth Circuit precedent about Arizona

mitigation jurisprudence. *Belmontes v. Ayers*, 529 F.3d 834, 865 n. 13 (9th Cir. 2008)(evidence of regular use of drugs to help cope with unpleasant circumstances of life must be considered. It "need not have any connection whatsoever to the crime in order to be relevant and humanizing. *Tennard v. Dretke,* 542 U.S. 274, 287-88 (2004)"); *Styers v. Schriro,* 2008 U.S. App. LEXIS 22054 (9th Cir. 2008)(holding that the Arizona Supreme Court had not properly considered all relevant mitigation evidence. "[T]he Arizona Supreme Court appears to have imposed a test [the nexus test] directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body. *Smith v. Texas,* 543 U.S. 37, 45 (2004)(citing *Eddings* [*v. Oklahoma,* 455 U.S. 104 (1982)], and stating that nexus test is a test 'we never countenanced and now have unequivocally rejected,' and that this holding was 'plain under [its] precedents' . . ."). But both the Arizona Courts, and the Ninth Circuit in this case, acted contrary to these "plain precedents."

There is probably no more important an issue to the Court's capital punishment jurisprudence than the proper scope, admissibility and consideration of mitigation evidence. Its proper application is doubtless the single most important facet in holding capital punishment to be constitutional. Therefore, its proper application by the lower courts is exceedingly important. It has been the subject of successive opinions of this Court on both the *Lockett* rule itself, and the ineffectiveness of counsel in preparing and presenting a mitigation case. But it is apparent that further attention to the issue is needed from this Court, and precisely on the "nexus" aspect of the

issue. The continuing attention this Court has been required to devote to the Fifth Circuit's *Lockett* jurisprudence is one indication of such need. *E.g.Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Tennard v. Dretke,* 542 U.S. 274, 287-88 (2004); *Smith v. Texas,* 550 U.S. 297 (2007). And the need arises in other circuits, too, for both judge-imposed sentencing cases and jury sentencing. As an example of the volume of litigation on what constitutes allowable mitigation, and in how many different courts, in just 2007 and the first ten months of 2008, *Tennard , supra*, was cited by federal courts 313 times.[20] This Court should grant *certiorari* to address this continuing issue.

II

WHETHER POST CONVICTION COUNSEL'S INEFFECTIVENESS SHOULD BE RECOGNIZED AS "CAUSE" EXCUSING FAILURE TO EXHAUST INEFFECTIVENESS OF TRIAL AND DIRECT APPEALS COUNSEL CLAIMS PRESENTS THE IMPORTANT ISSUE RESERVED BY THIS COURT IN *COLEMAN*, PRESENTS THE ISSUE OF CONSTITUTIONAL RIGHT TO COUNSEL IN THIS CRITICAL PHASE OF A DEATH CASE, AND PRESENTS THE ISSUE WHETHER EXHAUSTION CAN BE EXCUSED UNDER 28 U.S.C. § 2254(B)(2)(B)(ii) .

Three serious federal issues deserving of adjudication on their merits were held unexhausted, and thus precluded, by the District Court[21] and the Ninth Circuit:[22] 1) Trial counsel's ineffectiveness in doing *nothing* to investigate and prepare a defense of Petitioner, for both guilt and penalty phases; 2) The trial judge's refusal to grant Petitioner a mental health examination for use in sentencing proceedings, *e.g.Ake v. Oklahoma,* 470 U.S.

[20] Source: https://w3.lexis.com/research2/citators/retrieve/shep/full.do?shepState=0_235983489&_md5=b2f5a71bdc079ba1920855f65c781455

[21] District Court order Sept. 17, 1999, pp. 4, 28, 29 (Dist. Ct. Dkt. # 39).

[22] 538 F.3d 1027, 1029, App. A. pp. 39, 42.

68 (1985); and 3) Ineffectiveness of Petitioner's counsel on direct appeal in not raising the issue of a mental health examination and not raising as a federal issue the trial court preclusion of evidence of intoxication.[23] Post conviction counsel was ineffective because he failed to preserve Petitioner's claims of ineffectiveness of trial and appellate counsel, in the motion for rehearing he filed in the trial court. *See* fn. 9, supra. Under Arizona law, these claims relating to ineffectiveness of trial and direct appeal counsel could *only* be raised in post conviction proceedings. *State v. Apelt,* 176 Ariz. 369, 861 P.2d 654 (1993)

The District Court rejected the contention that post conviction counsel ineffectiveness could be "cause" to excuse exhaustion by holding that under *Coleman v. Thompson,* 501 U.S.722 (1991) and *Pennsylvania v. Finley,* 481 U.S. 551 (1987) there simply was no constitutional right to counsel. Order, Sept. 19, 199, Exc. 40 pp 28, 29. It did not acknowledge or dispose of the argument that, because claims of ineffectiveness of trial and appellate counsel can only be raised in an Arizona post conviction proceeding, ineffectiveness of post conviction counsel should be deemed "cause," excusing failure to exhaust the claim.

The Ninth Circuit similarly disposed of this claim by making the general statement that "there is no constitutional right to counsel, however, in state collateral proceedings after exhaustion of direct review [citing *Finley, supra.*]" It then quoted dictum from a non-capital Arizona case for the

[23] Either failing, by itself, raises this issue.

proposition that "Under Arizona law, a defendant is only entitled to counsel through the disposition of his or her first post-conviction petition. . . . After . . . the trial Court makes its required review and disposition, counsel's obligations are at an end." 538 F.3d at 1027, App. A. p. 39, quoting *State v. Smith,* 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). For this case, in which post conviction counsel's ineffectiveness *did* occur at the first stage, in the trial court, that statement is irrelevant, or at best ambiguous. Moreover, it was not useful, inasmuch as the *Finley* and *Coleman* issue – the right to counsel – is one of federal constitutional law, not state law. The Ninth Circuit then said "Because Cook had no constitutional right to counsel at the motion for rehearing stage, any errors by his counsel could not constitute cause to excuse default. *See Coleman, . . .*" 538 F.3d at 1027, App. A. p. 39. As with the District Court, the Ninth Circuit did not take cognizance of petitioner's argument that "any error by post conviction *trial counsel* on an issue that could only be raised for the first time in post conviction proceedings, is not subject to preclusive rule of *Coleman* . . . "[24]

A. <u>This court should grant certiorari because the lower courts here, as do others, ignore the fact that this Court in *Coleman* did not decide the issue of whether there is a right to post conviction counsel for a case involving claims that can only be raised in post conviction proceedings, such as ineffective assistance of counsel.</u>

[24] Petitioner had made this argument in Petitioner's Opening Br. p. 72, Suppl. Reply Br. p. 18, and Correction to Supplemental Reply Br. p. 4.

In *Coleman v. Thompson,* 501 U.S. 722 (1991) this Court expressly noted the potential for "an exception to the rule of *Finley*[25] and *Giarratano*[26] in those cases where state collateral review is the first forum in which a prisoner can present a challenge to his conviction." 501 U.S. at 755. But in *Coleman* the Court did not address that possibility because it was not presented by the facts of that case. The issue reserved in *Coleman* is squarely presented here – ineffectiveness of counsel at the trial court level of a state post conviction proceeding, involving a claim which could *only* be raised in post conviction proceedings under state law; *i.e.* ineffectiveness of trial and direct appellate counsel.

It is important to review this case because the Circuits have broadly declined to determine whether *Coleman's* rule is subject to this exception. *E.g. Mackall v. Angelone,* 131 F.3d 442, 451 (4th Cir. 1997); *Sweet v. Delo,* 125 F.3d 1144, 1151 (8th Cir. 1997); *Bonin v. Caldero,* 77 F.3d 1155, 1159 (9th Cir. 1996); *Arthur v. Allen,* 452 F.3d 1234, 1249 (11th Cir. 2006)(citing *Hill v. Jones*, 81 F.3d 1015, 1025-26 (11th Cir. 1996)). At least one state court has also adopted this Court's Coleman rule, without focusing on the particulars of this issue. *E.g. Menzies v. Galetka,* 2006 Utah 81, ¶ 84, 150 P.3d 480 (2006).

The Ninth Circuit even has an intra-circuit conflict on the issue. In *Bonin v. Caldero, supra,* it held that there was *not* an exception. In Petitioner's case, it did not address the exception issue at all, even though asked to do so. In *Moormann v. Schriro*, 426 F.3d 1044, 1058 – 59 (9th Cir.

[25] *Pennsylvania v. Finley,* 481 U.S. 551 (1987).
[26] *Murray v. Giarratano,* 492 U.S. 1 (1989).

2005), however, it held that there *was,* an exception, albeit under unusual circumstances that really have no bearing on whether the right to counsel should be recognized.[27]

In Arizona, Petitioner was directed by Arizona Supreme Court decision to defer claims of ineffective assistance of counsel to post conviction proceedings. *State v. Apelt,* 176 Ariz. 369, 374, 861 P.2d 654, 659 (1993); *State v. Valdez,* 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). This Court should grant certiorari and at least hold that the state cannot deprive Petitioner of effective assistance of counsel by its choice of where he can bring his "first appeal" on a central issue like ineffectiveness of counsel.

B. With the benefit of twenty one years of further development of the role of post conviction proceedings in capital litigation since *Pennsylvania v. Finley*, this Court should again consider the issue whether a capital defendant is entitled to counsel at those stages of a prosecution of which an accused in a death case must avail himself in order to exhaust all appropriate federal claims.

This Court should grant certiorari to consider whether the time has come to recognize, based on the actual conditions now extant in death case litigation, that effective post conviction proceedings have become an integral

[27] In *Moormann*, the Ninth Circuit observed that trial and post conviction counsel were the same, and mentioned a "potential conflict." However, that fact merely presented one way in which post conviction counsel could be ineffective – because of a conflict tending to dissuade post conviction counsel from raising a claim of his own ineffectiveness. The principle at issue, however, is that for claims like these, the accused is entitled to effective post conviction counsel, regardless of what may be the nature or cause of the ineffectiveness – a conflict of interest or otherwise.

part of a capital criminal prosecution if it is to meet the requirements of the Eighth Amendment. If so, Petitioner is entitled, under the Sixth and Eighth Amendments and the due process and equal protection clauses of the Fourteenth Amendment to post conviction counsel, just as much as he is entitled to counsel for the traditional first appeal. If, as Petitioner asserts, state post conviction proceedings are essential to a reliable capital case process, the principles of *Powell v. Alabama, Gideon v. Wainwright, In re Gault, and Argersinger v. Hamlin,* mandate the result here.[28] In those cases, this Court had no difficulty identifying the constitutional principle – the appointment of counsel is "a fundamental right, essential to a fair trial." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). This Court has reiterated the principle in its succession of cases recognizing the right to counsel:

> "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

Gideon, supra, 372 U.S. at 344

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the

[28] *Powell v. Alabama,* 287 U.S. 45 (1932)(right to counsel in a capital case); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (in felony case); *In re Gault,* 387 U.S. 1 (1967)(in juvenile proceeding); *Argersinger v. Hamlin,* 407 U.S. 25 (1972)(if facing any imprisonment.)

> guiding hand of counsel at every step in the proceedings against him."

Id., 372 U.S. at 344, 345, quoting *Powell v. Alabama,* 287 U.S. 45, 68 – 69 (1932). Surely the foregoing observation applies even more strongly for state capital post conviction proceedings.

The question is simply whether the constitutional principle extends to this phase of capital prosecutions. Heretofore, when recognizing rights to counsel for juvenile proceedings, *In re Gault, supra,* or misdemeanor proceedings that could lead to incarceration, *Argersinger, supra,* felonies, *Gideon, supra,* or capital cases, *Powell, supra,* this Court simply said the right existed for the "trial," or the "proceeding." That was sufficient. There was no uncertainty. But with the modern complexity of capital prosecutions, the issue is "to what proceedings does the fundamental right to counsel apply?"

Is a post conviction proceeding a regular and integral part of the state's prosecution of a death case? Petitioner asserts that it is, and that this Court should consider the right to counsel in light of that reality.

The competing considerations on this issue are well summarized in *Murray v. Giarratano,* 492 U.S. 1 (1989). Chief Justice Rehnquist's plurality opinion distinguished trial proceedings, where a right to counsel exists, from post conviction proceedings, on the grounds that 1) in an appellate stage, defendant needs an attorney "not as a shield to protect him from being 'haled into court' . . . but rather as a sword to upset the prior determination of guilt,"

Id. p. 8; 2) that while there are special Eighth amendment constraints on procedures to convict an accused of a capital offense and sentence him to death, this only applies to the jury trial phase; *id.* p. 8, 9; 3) that there is no meaningful difference between post conviction capital and non-capital proceedings, and both "serve a different and more limited purpose than either the trial or appeal [implying that the post conviction proceedings is of relatively little importance]" *Id.* p. 10; and 4) because "direct appeal is the primary avenue for review of capital cases as well as other sentences, Virginia may quite sensibly decide to concentrate [its lawyer resources for trials and direct appeals.] Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack."[29] *Id.* p. 11.

Justice O'Connor, part of the plurality, summarized the basic premise from *Pennsylvania v. Finley,* 481 U.S. 551 (1987), which underlay the plurality approach: "A post conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment." *id.* p. 14. This of course states the conclusion fully as much as it does the premise. This petition suggests that the premise no longer fits and the conclusion is not warranted if a capital

[29] But this is not a "zero sum game," and in any event, as discussed *infra***,** virtually all of the states with a capital punishment system have chosen to afford counsel. Thus, this concern is mooted, and the true question of this Petition is – shouldn't that counsel be constitutionally effective?

sentencing system, as administered by the states, today is to conform to Eight Amendment reliability requirements..

Justice Stevens' dissent for himself and three other Justices in *Giarratano* would have held that due process *did* require appointment of counsel to pursue the post conviction remedies. He believed that "the fountainhead of this body of law, *Powell v. Alabama,* " 287 U.S. 45 (1932) applied and mandated the outcome, 492 U.S. at 16, because the qualitative difference of a sentence of death supported this conclusion, *Id.* at 21; that the postconviction process is a state mandated phase of the capital prosecution, *Id.* p. 25; that special burdens upon the death row inmate particularly impair his ability to, himself, prepare and prosecute a post conviction proceeding of extreme complexity, *Id.* p. 27; and that the required balance of the inmate's interest against governmental interests, *e.g. Mathews v. Eldridge,* 424 U.S. 319, 334 – 335 (1976), favors affording counsel. *Id.* p. 29.

The *holding* of *Giarratano* is found in Justice Kennedy's concurrence. It disagrees with the plurality's view of the relative unimportance of collateral proceedings, finding them to be "a central part of the review process for prisoners sentenced to death." *Id.* p. 14. The concurrence recognized that "The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law. [Presumably, competent and effective persons learned in the law.] *Ibid.*

However, Justice Kennedy chose to allow the states discretion to explore and select appropriate solutions to provide death row inmates like petitioner meaningful access to the courts. *Ibid.* Noting that the American Bar Association, the Judicial Conference of the United States, and Congress were conducting assessments of the difficulties presented by collateral litigation in capital cases, Justice Kennedy thought it better to stay the Court's hand and not impose a "categorical remedy" that "might pretermit other responsible solutions being considered in Congress and state legislatures." *Ibid.*

Petitioner's request that this Court again visit the issue of the right to effective counsel in post conviction proceedings is prompted in great part by the fact that the state of Arizona has chosen its remedy – to afford counsel to post conviction petitioners – as have all but one of the states with capital prosecution systems. This Petition draws further support form the fact that the American Bar Association in 2003 also concluded after extensive study that post conviction petitioners in capital cases should have *effective* counsel.[30]

Subsequent developments in this Court also counsel review of this case. Cases of this Court more recent than *Finley, Giarratano* and *Coleman* serve to demonstrate how the evolving role of post-conviction proceedings, particularly for capital litigation, casts doubt on the premises of those cases.

This Court held in *Massaro v. United States*, 538 U.S. 500 (2003), that normally ineffective assistance of counsel claims in federal prosecutions

[30] *See* fn. 34 *infra,* and accompanying text.

should be raised in post conviction proceedings. The Court noted that "A growing majority of state courts now follow the rule we adopt today." 538 U.S. at 508. Of course, Arizona is one of them, not merely permitting, but requiring resort to post conviction proceedings for such claims. *State v. Apelt*, 176 Ariz. 369, 374, 861 P.2d 654, 659 (1993); *State v. Valdez,* 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). It has been observed that *Massaro* casts doubt on the viability of prior Court decisions denying a constitutional right to appointed counsel in state post conviction proceedings. Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable reflections on Massaro v. United States*, 42 Brandeis L. J. 793, 801—803 (2004)(to hold that even though ineffectiveness claims can only logically be fully and adequately litigated in post conviction proceedings "is to say that the defendant enjoys access to appointed counsel on appeal to litigate issues with no bearing on guilt or innocence, but has no right to appointed counsel to litigate the minimal effectiveness of his lawyer at trial itself.")

This Court also has receded from a "bright line" distinction between appeals "as of right" and discretionary review, taking a more detailed look at the practicalities of a particular judicial review, and its importance in the criminal prosecution of an accused, when deciding whether to afford counsel. *Halbert v. Michigan,* 545 U.S. 605 (2005), recognized that a right to counsel did not turn on the "formal categorize[ation] as the decision of an appeal or the disposal of a leave application," but on the reality that the proceeding for

which the Court afforded a right to counsel "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." 545 U.S. at 619. The reasoning of that holding is directly applicable to this issue. It undercuts the force of distinguishing between "discretionary" review and appeals "of right."[31]

It is becoming ever more clear that fundamental fairness and traditional principles of due process and equal protection logically dictate affording counsel to an accused in this circumstance, and that the bases upon which this Court held otherwise in *Finley, Giarratano* and *Coleman* no longer hold true. *See* Givelber, *Symposium; Gideon – A Generation Later; The Right To Counsel in Collateral Post-Conviction Proceedings*, 58 Md. L. Rev. 1393 (1999)("It is one thing to articulate a due process standard when the question is how to determine the historical fact of guilt or innocence, but quite another to define the standard when the question is 'what should we do with the killer'? We have had centuries of experience trying to answer the first question and twenty five years attempting to answer the second" p. 1400, 1401;"Denying a right to counsel in post-conviction proceedings cannot be justified on the ground that the defendant has already received all the process that he is due" P. 1408.)

Courts are also recognizing that the concept of "agency," derived from civil cases, which was a strong basis for this Court's *Finley* holding, does not

[31] *See,* Jordan M. Streiker, *Article: Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform Within States,* 34 Am. J. Crim. L. 293, 307 (2007)(*Giarrtano* rationale based on such distinction "misguided.")

apply now, even if there was a reasonable fit to post conviction cases in 1987. In recognizing a right to counsel in post conviction proceedings which derived from the Utah Constitution, the Utah Supreme Court made just such a holding. *Menzies v. Galetka,* 2006 Utah 81, ¶ 77, 150 P.3d 480 (2006)(justification for imputing acts and omissions of counsel to client not present, where accused was appointed counsel by district court pursuant to Utah statute, which did not permit defendant a voluntary choice of counsel.) The Utah Supreme Court noted that Utah statute extended the right to appointed counsel in death cases. It observed that the high stakes inherent in death penalty proceedings calls for providing appointed counsel as an important step in assuring that the underlying criminal conviction was accurate. And it refused merely to hold that a petitioner in a post-conviction death penalty case "is only entitled to ineffective assistance . . . " *Id.* at ¶ 82. *And see Lee v. State,* 367 Ark. 84, 238 S.W.3d 52 (2006)(requiring effective assistance of capital defendants in state post-conviction proceedings.) In fact, as of 2006, "every active death penalty state today, with the exception of Alabama, provides for the *prefiling* appointment of counsel to assist indigent death row inmates in the preparation of post conviction petitions challenging their convictions and sentences."[32]

In Arizona the post conviction proceeding for a capital case is initiated by the Arizona Supreme Court. Ariz. Rev. Stat. Ann. § 13-4234 D. Ariz.

[32] Eric M. Freedman, *Symposium: Further Developments in the Law of Habeas Corpus: Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings.* 91 Cornell L. Rev. 1079, 1081 & nn. 12, 45 (2006)

R.Crim. P. 32.4(a).[33] The Supreme Court appoints counsel to represent the petitioner, and establishes prerequisites to be met by any counsel so appointed. Ariz. Rev. Stat. Ann. § 13-4041 B (1996). The preference of the petitioner is not one of those prerequisites, except that the Court may appoint previous counsel with petitioner's consent.

Thus, the distinction drawn by the *Giarratano* plurality, between trials, where a lawyer is guaranteed, and post conviction proceedings thought to be a "sword to upset the prior determination of guilt," *Id.* p. 8 has become disconnected from the reality of capital case prosecution.

One indication that the fundamental fairness component of due process now calls for extending the right to counsel in this circumstance is that the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)(the "ABA Guidelines") which "embody the current consensus about what is required to provide effective defense representation in capital cases,"[34] call for affording a death row inmate competent counsel, including for post conviction proceedings. *See* ABA Guideline Standards 1.1, Objective and Scope of Guidelines, 10.2, Applicability of Performance Standards and 10.15.1, Duties of Post Conviction Counsel, all of which speak to the claim presented here. This Court has "long" referred to these Guidelines "as guides to determining what is reasonable," *Rompilla v. Beard,* 545 U.S. 374, 375 (2005). It has cited them as guidelines addressing ineffective assistance

[33] *See, also, State v. Bolton*, 182 Ariz. 290, 299, 896 P.2d 830 (1995)(a Rule 32 proceeding is mandatory upon the affirmance of a death sentence.)
[34] History of Guideline 1.1, ABA Guidelines.

under *Strickland v. Washington,* 466 U.S. 668 (1984). *Florida v. Nixon,* 543 U.S. 175, 191 (2004).

The principles the ABA adopted as Standards 1.1, 10.2 and 10.15.1 suggest that a fresh look at this issue is necessary. More pointedly, the considerations and conclusions in the Guidelines "suggest that counsel should continue to contest the solidity of *Murray v. Giarratano,* 492 U.S. 1 (1989)." ABA Guidelines, Standard 1.1, fn. 46. A product of an extended deliberative process with wide participation, including death penalty litigation experts, five ABA sections and five outside organizations,[35] this statement commands attention and should prompt consideration of whether *Giarratano's* holding should have continuing vitality.

One may consider whether the right Petitioner urges this Court to recognize could be seen as advancing or retarding the federal principle represented by such requirements as "exhaustion," fair presentation of claims to state courts, and deference to state court factual determinations, contained in the Antiterrorism and Effective Death Penalty Act and in this Court's capital case jurisprudence. A short sighted view of the situation might conclude that imposing a requirement of effective counsel at post conviction proceedings in death cases will yield more "exhausted" claims, thus more federal habeas corpus litigation. But that is not intrinsically bad. Federalism is not offended if District Courts adjudicate more rather than

[35] ABA Guidelines, Introduction. The Guidelines were adopted by the ABA House of Delegates without a single dissenting vote. Freedman, *supra,* n. 13.

fewer claims properly exhausted in state courts, or excused from such requirement for acceptable reasons. Reversal rates for capital cases are high. "The most comprehensive available data shows that 68% of death sentences did not survive postconviction review. Approximately 47% were reversed at the state level (41% on direct appeal and 6% on state collateral attack), and a further 21% on federal habeas corpus review."[36] Thus confidence in the integrity of the capital prosecution system depends in great part upon federal habeas corpus litigation.

The longer view recognizes that affording effective counsel to a death row inmate in post conviction proceedings will tend to increase the number of cases in which state courts adjudicate federal claims. Such a holding by this Court ought to encourage the states to provide competent counsel in post conviction cases, thus gaining significantly more control of and responsibility for catching the errors of federal law in their own systems. Therefore, in the long term, adopting the rule Petitioner urges this Court to consider would more likely reduce the number of federal habeas corpus ineffectiveness claims than increase them.[37] The potential would be for the reversal rate of 6% in

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[36] Eric. M. Freedman, *Symposium: Further Developments in the Law of Habeas Corpus: Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings,* 91 Cornell L. Rev. 1079, 1097 (2007)

[37] Nor would such a rule run afoul of the proviso of 28 U.S.C. § 2254(i) that "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." If ineffective post conviction counsel excused exhaustion of a federal claim, that claim would still have to stand on its own and be separately measured against clearly established precedent of this Court before there would be "ground for relief."

state post conviction cases to become the 21%, and the 21% in federal habeas cases to become the 6%.

C. This Court should consider whether post conviction counsel failures to exhaust ineffectiveness claims constitutes a circumstance that rendered such process ineffective to protect the rights of the applicant under 28 U.S.C. § 2254(b)(1)(B)(ii).

This issue is more limited in its scope than the constitution-based ones. It presents a matter of statutory construction pointed directly at the failure of exhaustion. Given the current post conviction proceedings process in Arizona, *see* fn. 33, *supra,* and accompanying text, post conviction counsel's deficiency in not exhausting the ineffectiveness claims really cannot fairly be attributed to petitioner. The lawyer is part of the state's capital prosecution system. In reality, competent counsel really is needed in order to "effectively protect" petitioner's rights at this stage.

A few courts have considered and declined to hold this point. *E.g. Martinez v. Johnson,* 255 F.3d 229, 238 n. 10 (5th Cir. 2005)(no analysis); *Beasley v. Johnson,* 242 F.3d 248, 270 –71 (2001)(no analysis.) But to pretend otherwise than that post conviction counsel's failing rendered the process ineffective blinks reality. The language of section 2254(b)(1)(B)(ii), plainly read, inexorably leads to the conclusion that exhaustion is excused.

To grant certiorari and reverse based on this issue would least disturb the current jurisprudence. Petitioner submits that this Court should address

the constitutional issue, either that posed by the question reserved in *Coleman,* or that of *Giarratano,* given the current state of knowledge and practice regarding capital prosecutions in general, and the central role of post conviction proceedings. But at least it should consider the statutory issue.

III

THIS COURT SHOULD ANSWER THE QUESTION RESERVED IN BALDWIN V. REESE. THERE IS A SIGNIFICANT SPLIT AMONG THE CIRCUITS ON WHETHER RAISING A FEDERAL CLAIM IN STATE LAW TERMS SUFFICES WHEN THE TWO CLAIMS ARE EQUIVALENT.

This case is especially suited for deciding whether "fair presentation" of a federal claim to a state court, in state law terms, occurs when the state and federal claims are identical. The claim that was presented here was bias of the trial court judge. That issue is uniquely congruent between state and federal law, at least for the state of Arizona. Thus, this case presents for decision the core principle, unencumbered by the complication of the degree to which the particular state and federal claims are congruent.[38]

Petitioner made the claim of judicial bias in the Arizona Supreme Court. The District Court acknowledged that Cook's claim had been exhausted in the state court, but concluded that it had not been fairly presented as a federal claim, citing *Duncan v. Henry,* 513 U.S. 364 (1995).[39] The Court concluded that because Cook's counsel did not include a federal constitutional label to the claim as it was being presented and exhausted, it

[38] This case does not present the lack of clarity about the identical nature of the state and federal claims which caused this Court to dismiss, as improvidently granted, *Howell v. Mississippi,* 543 U.S. 440 (2005)(no state equivalent to a *Beck* claim.)
[39] District Court Order Sept. 19, 1999 pp. 34 *et. seq.* (Ariz. D. Ct. Dkt. #39).

had not been "fairly presented." The Court of Appeals affirmed, reaching the same conclusion. 538 F.3d at 1030, App. A. p. 43.

A claim of judicial bias is measured identically under Arizona state law and federal due process law.

The right to an impartial judge has long been a clearly established constitutional rule recognized by this Court. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Monroeville,* 409 U.S. 57 (1972); *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 865 n. 12 (1988). The prohibition against a judge presiding over a case who is not impartial is not limited to bias because of direct personal or pecuniary interest. Further, it is not limited to cases where actual bias is shown.

This Court in *Ward, supra,* commenting about the facts in *Tumey, sura,* said:

> "The fact that the mayor there shared directly in the fees and costs did not define the limits of the principle. Although 'the mere union of the executive power and the judicial power in him can not be said to violate due process of law,' id. at 534, the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ' id. at 532." *Ward v. Monroeville,* 409 U.S. 57, 59-60 (1972).

In this case the trial judge had taken an advocate's position in connection with the Matzke plea. He had expressly conditioned his decision to accept Matzke's favorable plea bargain upon a determination that Matzke's testimony was necessary to convict Petitioner. At the time when he

was adjudicating issues in Petitioner's case, and sentencing him to death, he had lost that neutral position enabling him to "hold the balance nice, clear and true between the State and the accused."

The federal due process requirement of an impartial judge extends to a requirement that there be no appearance of bias. In 1986 this Court said:

> "We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true.' The Due Process Clause 'may sometimes bar trial by judges who had no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986).

The Arizona rule is either congruent or falls inside the outer boundary of the federal due process right. "The right to a fair trial is a foundation stone upon which our present judicial system rests. Necessarily included in this right is the right to have the trial presided over by a judge who is completely impartial and free of bias or prejudice." *State v. Neil,* 102 Ariz. 110, 112 (1967). In applying *Neil*, the Arizona Supreme Court has elaborated upon what constitutes impermissible interest, bias or prejudice, using Canon of Judicial Conduct 3(c):

> "(1) A judge should disqualify himself in a proceeding in which his impartiality *might reasonably be questioned*, including but not limited to instances where:

> "(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." *State v. Brown,* 124 Ariz. 97, 99 – 100 (1979)(emphasis supplied).

The Arizona Supreme Court in *State v. Brown, supra,* also said that "A judge must be careful never to act in the dual capacity of judge and advocate." *Id.* at 100.

Obviously, what federal due process requires for impartiality of a judge is completely overlapped by Arizona law. In these circumstances, Petitioner's presentation and exhaustion of his claim that he was denied an impartial judge was adequate to fulfill the "fair presentation" requirement.

In applying *Duncan v. Henry*, *supra,* this Court has recognized the prospect that presenting a state law claim that is substantially identical to a federal constitutional claim may satisfy the fair presentation requirement. *Baldwin v. Reese,* 541 U.S. 27, 33 – 34 (2004)(finding failure of presentation on another ground, Court does not reach contention that there is not need to indicate federal nature of claim because state and federal standards of adjudication are identical.) The Circuits are significantly split on the point.

The Third and Sixth Circuits explicitly hold that a claim is fairly presented if "asserted in terms so particular as to call to mind a specific right protected by the Constitution, or an allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *Nara v. Frank,* 488 F.3d 187, 198 (3d Cir. 2007); *Gonzales v. Wolfe,* 2008 U.S. App. LEXIS 17808 (6th Cir. 2008) The Eleventh Circuit holds that presenting an identical state

law claim provides fair presentation. *Mulnix v. Sec'y for the Dep't of Corr.,* 254 Fed. Appx. 763, 2007 U.S. App. LEXIS 28878 (11th Cir. 2007).

Two Circuits have applied a "same legal standard" rule to hold that fair presentation did occur. *Jackson v. Edwards,* 404 F.3d 612, 620 – 21 (2d Cir. 2005)(where claim involved clear due process violation, and failure was "so harmful as to deny the defendant due process."); *Pope v. Netherland,* 113 F.3d 1364, 1368 (4th Cir. 1997)(*cert. den.* 521 U.S. 1140 (challenge to sufficiency of evidence is necessarily a federal due process challenge, and thus fairly presents a federal claim.)

The Seventh Circuit and Tenth Circuits, taking similar positions, have held that a claim asserted by description but not reference to federal law was fairly presented. *Malone v. Walls,* 538 F.3d 744 (7th Cir. 2008); *Berg v. Foster,* 244 Fed. Appx. 239 (10th Cir. 2007).

But the Eighth Circuit takes a conflicting position. It has "repeatedly held that a federal habeas petitioner does not fairly present a federal issue to the state courts unless he refers to a specific federal right or federal constitutional provision, or cites pertinent case law discussing the federal issue in question." *White v. Dingle,* 267 Fed. Appx. 489 (8th Cir. 2008)

The Ninth Circuit has avoided the issue. In *Peterson v. Lampert,* 319 F.3d 1153 (9th Cir. 2003)(*en banc*) the Ninth Circuit recognized that this Court "left open the question of what happens when the state and federal standards are not merely similar, but are, rather, identical or functionally

identical." 319 F.3d at 1160. But in this Case the Ninth Circuit *held* that Petitioner "failed to indicate a federal law basis for his claim . . . " 538 F.3d at 1030, App. A p. 44, and mistakenly characterized the Arizona state law on judicial bias as only "somewhat similar" to the federal standard, thus enabling itself to avoid the issue. *Ibid.*[40]

This Court's writings on the issue have been in *per curiam* dispositions. Plenary consideration to resolve this Circuit split would be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted.

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[40] Petitioner demonstrated to the Ninth Circuit that the claims are "functionally identical," *id.* p. 60; "congruent," Op. Br p. 62 and present a "complete overlap," *ibid,* and are not merely "somewhat similar." But the Ninth Circuit did not consider the claim on that basis.