

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**
October Term, 2010

DANIEL WAYNE COOK,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

**On Petition for a Writ of Certiorari to the
Arizona Superior Court**

PETITION FOR A WRIT OF CERTIORARI

Michael J. Meehan
333 North Wilmot
Suite 300
Tucson, AZ 85711
mmeehan@mungerchadwick.com
(520) 721-1900

Counsel of Record for Petitioner

QUESTION PRESENTED

(CAPITAL CASE)

In an Arizona capital case, a post conviction proceeding in the trial court is mandated by statute and criminal rule after completion of the direct appeal. It is designated an integral part of the original prosecution. It is initiated by the Arizona Supreme Court, without action by a capital defendant. That Court chooses and appoints counsel for the post conviction proceeding. If Petitioner claims that his counsel at trial or upon appeal were ineffective he can only assert such claims in the post conviction proceeding.

The question presented is whether Petitioner is entitled under the Sixth and Fourteenth Amendments to have *effective* post conviction counsel to raise those claims, because that proceeding represents Petitioner's first review allowed by the Arizona courts for such claims.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
A. Cook's Infancy and Childhood.....	2
B. Cook's Life as an Adult.....	9
C. The Crime.....	12
D. Cook's Prosecution.....	13
E. Compelling Mitigation Would Have Made a Difference.	15
F. Post Conviction Proceedings in Arizona Capital Cases.	18
G. Petitioner's Automatic Post Conviction Proceeding.	19
H. Petitioner's Additional Attempts to Have a Mitigation Case Investigated.	20
I. Comprehensive Mitigation Investigation Conducted by the Federal Public Defender in 2010.....	22
J. The Federal Constitutional Issue was Properly Raised in Both the Trial Court and the Arizona Supreme Court, the Rulings of Which Were Based on Federal Law, Not an Independent State Ground.	24
REASONS FOR GRANTING THE WRIT.....	26
I. THE RIGHT TO COUNSEL ISSUE RAISED HERE INVOLVES VIRTUALLY THE LAST SIGNIFICANT STAGE OF PROSECUTION FOR WHICH THIS COURT HAS NOT DEFINITELY ESTABLISHED A RULE. MOREOVER, STATE AND FEDERAL COURTS HAVE GIVEN DIFFERING TREATMENT TO COLEMAN'S RESERVATION OF THE ISSUE.....	27
II. INEFFECTIVENESS OF TRIAL AND DIRECT APPEAL COUNSEL IN CAPITAL CASES IS COMMON. REVIEW IS WARRANTED OF AN	

ISSUE THAT ARISES IN NUMEROUS STATES, THE RESOLUTION OF WHICH MAY IMPROVE THE QUALITY OF CAPITAL LITIGATION.	32
III. IF A RIGHT TO EFFECTIVE POST CONVICTION COUNSEL IS RECOGNIZED THE DETERMINATION OF EFFECTIVENESS OF TRIAL AND APPEAL COUNSEL WOULD BE MADE MUCH SOONER, AND INTERESTS OF FEDERALISM WOULD BE BETTER SERVED BECAUSE STATE COURTS WOULD MAKE THE DETERMINATION MORE OFTEN.	35
CONCLUSION.....	39

TABLE OF AUTHORITIES

Cases

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	25
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	28
<i>Arthur v. Allen</i> , 452 F.3d 1234 (11 th Cir. 2006)	30
<i>California v. Brown</i> , 479 U.S. 438 (1987)	18
<i>Callins v. Johnson</i> , 89 F.3d 210 (1996)	30
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970).....	28
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	2, 24, 27, 29
<i>Commonwealth v. Adamides</i> , 37 Mass. App. Ct. 339, 639 N.E.2d 1092 (1994).....	34
<i>Cook v. Schriro</i> , 538 F.3d 1000 (9 th Cir. 2008)	21
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979).....	25
<i>Dodson v. State</i> , 326 Ark. 637, 934 S.W.2d 198 (1996).....	34
<i>Douglas v. California</i> , 372 U.S. 353 (1963).....	27, 28
<i>Duncan v. Kerby</i> , 115 N.M. 344, 851 P.2d 466 (1993)	34
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985)	29
<i>Faretta v. California</i> , 422 U.S. 806 (1976)	19
<i>Gibbons v. State</i> , 97 Nev. 520, 634 P.2d 1214 (1981)	34
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	28
<i>Halbert v. Michigan</i> , 545 U.S. 605 (2005)	32
<i>Hamilton v. Alabama</i> , 368 U.S. 52 (1961)	28
<i>Hance v. Kemp</i> , 258 Ga. 649, 373 S.E.2d 186 (1988)	20
<i>Hill v. Jones</i> , 81 F.3d 1015 (11 th Cir. 1996).....	30
<i>In re Gault</i> , 387 U.S. 1 (1967)	28

<i>In re Moskaluk</i> , 156 Vt. 294, 591 A.2d 95 (1991).....	34
<i>Jackson v. State</i> , 534 So.2d 689 (Ala. Crim. App.1988).....	34
<i>Jefferson v. Upton</i> , 130 S.Ct. 2217 (2010)	33
<i>Knowles v. Mirzayance</i> , 129 S.Ct. 1411 (2009)	33
<i>Kosydar v. National Cash Register Co.</i> , 417 U.S. 62 (1974).....	35
<i>Mackall v. Angelone</i> , 131 F.3d 442, 451 (4 th Cir. 1997)	30
<i>Martinez v. Johnson</i> , 255 F.3d 229 (5 th Cir. 2001).....	30, 31
<i>Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock</i> , 279 U.S. 410 (1929).....	1
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	28
<i>Montgomery v. Sheldon</i> , 182 Ariz. 118 (1995)	1
<i>Moore v. Illinois</i> , 434 U.S. 220 (1977)	28
<i>Moormann v. Schriro</i> , 426 F.3d 1044 (9 th Cir. 2005).....	30
<i>Murray v. Giaratano</i> , 492 U.S. 1 (1989)	29, passim
<i>People v. Mendoza Tello</i> , 15 Cal. 4 th 264, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997).....	34
<i>Porter v. McCollum</i> , 130 S.Ct. 447 (2009).....	33, 38
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	28
<i>Robinson v. State</i> , 16 S.W.3d 808 (Tex. Crim. App. 2000).....	34
<i>Rose v. Lundy</i> , 455 U.S. 509 (1982).....	35
<i>Smith v. Spisak</i> , 130 S.Ct. 676 (2010).....	33, 38
<i>Smith v. Texas</i> , 550 U.S. 297 (2007).....	25
<i>State v. Barrett</i> , 577 A.2d 1167 (Me. 1990)	34
<i>State v. Bess</i> , 185 W. Va. 290, 406 S.E.2d 721 (1991).....	34
<i>State v. Bortz</i> , 169 Ariz. 575, 821 P.2d 236 (App. 1991)	20
<i>State v. Dockery</i> , 78 N.C. App. 190, 336 S.E.2d 719 (1985).....	34

<i>State v. Dunster</i> , 278 Neb. 268, 769 N.W.2d 401 (2009).....	20
<i>State v. Elison</i> , 135 Idaho 546, 21 P.3d 483 (2001).....	34
<i>State v. Fraser</i> , 2000 N.D. 53, 608 N.W.2d 244 (2000)	34
<i>State v. Lucas</i> , 323 N.W.2d 228 (Iowa 1982).....	34
<i>State v. Malstrom</i> , 672 A.2d 448 (R.I. 1996)	34
<i>State v. Mata</i> , 185 Ariz. 319, 916 P.2d 1035 (1996).....	19
<i>State v. Patrick</i> , 42 Conn. App. 640, 681 A.2d 380 (1996).....	34
<i>State v. Picotte</i> , 416 N.W.2d 881 (S.C. 1987).....	34
<i>State v. Preciose</i> , 129 N.J. 451, 609 A.2d 1280 (1992)	34
<i>State v. Seiss</i> , 428 So.2d 444 (La. 1983)	34
<i>State v. Spreitz</i> , 202 Ariz. 1, 39 P.3d 525 (2002).....	19, 32, 34
<i>State v. Van Cleave</i> , 239 Kan. 117, 716 P.2d 580 (1986)	34
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	14, 19, 26
<i>Styers v. Schriro</i> , 547 F.3d 1026 (9th Cir. 2010).....	15
<i>Sweet v. Delo</i> , 125 F.3d 1144 (8 th Cir. 1997)	30
<i>Tennard v. Dretke</i> , 542 U.S. 274 (2004)	15
<i>United States v. Fessel</i> , 531 F.2d 1275 (5 th Cir. 1976)	20
<i>United States v. Wade</i> , 388 U.S. 218 (1967).....	28
<i>Virginian R.R. Co. v. Mullens</i> , 271 U.S. 220 (1926)	1
<i>Ware v. State</i> , 360 Md. 650, 759 A.2d 764 (2000)	34
<i>White v. Maryland</i> , 373 U.S. 59 (1963)	28
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	34
<i>Wong v. Belmontes</i> , 130 S.Ct. 383 (2009)	33, 38
<i>Wood v. Allen</i> , 130 S.Ct. 841 (2010).....	33, 38

<i>Wuornos v. State</i> , 676 So.2d 972 (Fla. 1996)	34
---	----

Statutes

18 U.S.C § 3599	22
28 U.S.C. § 1257(a).....	1
28 U.S.C. § 2244(d)(1)	20
Antiterrorism and Effective Death Penalty Act, Pub. L. No 104-132, 110 Stat. 1214 (1996).....	35
Ariz. Rev. Stat. Ann. § 13-4041 B (1996)	19
Ariz. Rev. Stat. Ann. § 13-4234 D.....	19
Ariz. Rev. Stat. Ann. § 13-4234(D)	28

Other Authorities

Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Judicial Conference of the United States, Committee Report (Sept. 27, 1989) <i>reprinted in</i> 45 Crim. L. Rep. 3239, 3240 (1989)	35
<i>Criminal Behavior and PTSD</i> , http://www.ptsd.va.gov/public/pages/ptsd-criminal-behavior.asp	17
Davidson, Michael J., <i>Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War</i> , 29 Wm. & Mary L. Rev. 415, 422 (1988).....	18

Rules

Ariz. R. Crim. P. 32.1(e)(2).....	23
Ariz. R. Crim. P. 32.2	24, 25
Ariz. R. Crim. P. 32.3	18
Ariz. R. Crim. P. 32.4(a).....	19
Ariz. R. Crim. P. 32.9(f).....	1

Treatises

Eric. M. Freedman, <i>Symposium: Further Developments in the Law of Habeas Corpus: Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings</i> , 91 Cornell L. Rev. 1079, 1097 (2006).....	33
Gressman <i>et. al.</i> SUPREME COURT PRACTICE §4.25 p. 298 (Ninth Ed. 2007)	35
Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, Oct. 1993, with updates from Death Penalty Information Center, reported in Death Penalty Information Center, Facts About the Death Penalty, September 20, 2010	33
Tracy J. Snell, U.S. DEPT. OF JUSTICE, NCJ 179012, CAPITAL PUNISHMENT 1998 at 13. App. Table 1	32

PETITION FOR A WRIT OF CERTIORARI

Daniel Cook, an Arizona inmate under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Superior Court rejecting his claims of ineffective assistance of counsel.

OPINIONS BELOW

The Order of the Arizona Supreme Court denying review of the Superior Court order denying his petition for post conviction relief is Appendix A hereto. The Order of the Mohave County, Arizona, Superior Court denying a Third Petition for Post Conviction Relief is Appendix B hereto. That court's order denying rehearing is Appendix C hereto. The opinion of the Arizona Supreme Court affirming Petitioner's conviction, 170 Ariz. 40, 821 P.2d 731 (1991), is Appendix D hereto.

JURISDICTION

The Arizona Supreme Court denied discretionary¹ review on March 22, 2011. The decision of the Arizona Superior Court was a final decision of the case.² This Petition is timely and this Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioner is under a warrant for his execution on April 5, 2011.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

¹ Ariz. R. Crim. P. 32.9(f); *Montgomery v. Sheldon*, 182 Ariz. 118, 120, 893 P.2d 1281 (1995).

² *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock*, 279 U.S. 410 (1929); *Virginian R.R. Co. v. Mullens*, 271 U.S. 220 (1926).

The Fourteenth Amendment provides: “nor shall any state deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

Petitioner was convicted of two murders and sentenced to death in 1988. Due to ineffectiveness of his trial and appellate counsel, a compelling mitigation case was never investigated or presented until 2010. This delay occurred because under Arizona criminal procedure the only remedy available to redress ineffective representation by trial and appellate counsel is in a post conviction proceeding. But Petitioner’s lawyer in that proceeding was, himself, ineffective. Because this Court held in *Murray v. Giarratano*, 492 U.S. 1 (1989) that no constitutional right to effective counsel exists for a post conviction proceeding, Petitioner has been denied any remedy for his trial and appellate counsels’ deficient performance.

This Petition ask this Court to consider the issue reserved in *Coleman v. Thompson*, 501 U.S. 722 (1991): whether a prisoner is entitled to competent counsel to assert a claim of ineffective assistance of counsel in a post conviction proceeding, when that is the only forum in which the prisoner is entitled to assert the ineffectiveness claim. Petitioner’s case is particularly appropriate to decide that issue, because the mitigation case which should have been presented is compelling.

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, Wanda gave birth to Cook. Cook’s abuse from his parents began *in utero*. Gordon beat Wanda while she was pregnant with Cook,

going so far as to physically attack his unborn child—he punched Wanda in the belly and pushed her down, causing her to land on her stomach. While she was pregnant Cook’s mother smoked cigarettes, drank beer, and was too poor to eat properly or see a doctor. As a result of this improper prenatal care, Cook was born prematurely in a Chicago hospital on July 23, 1961.³

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.⁴ Cook’s mother was a “predator and sex abuser,” mentally ill, and a “prescription pill junkie.”⁵ A counselor reported he had “never talked to a colder, more heartless person in his many years of social work.”⁶

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.⁷

Their step-grandfather Jim repeatedly sexually abused Cook and Debrah, and also forced them to have sex with each other at very young ages.⁸ 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

³ Ex. 7 to Petition for Post Conviction Relief, November 22, 2010, ¶¶ 4, 6, 8, 9. 8. (Hereinafter “PCR Ex.”)

⁴ *Id.*, ¶ 9.

⁵ *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.

⁶ Wyoming State Hospital Records, 1980-81, Clemency Ex. 40 at p. 26.

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

⁸ PCR Ex. 1, ¶ 18; PCR Ex. 8 ¶ 8; PCR Ex. 7 ¶ 10.

being sexually abused by their grandfather, and would hear Debrah crying in bed.⁹

Cook and his sister also suffered physical abuse and neglect by their grandparents. As punishment, Cook and his sister would be tied to chairs.¹⁰ 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.¹¹

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."¹² 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.¹³ He was controlling and abusive.¹⁴ Wanda moved to California with her new husband and new family, but left Cook and his sister behind in Chicago with their abusive grandparents.¹⁵ When Cook was nine, his grandmother Mae died. Only then, after four years of abuse and neglect, were Cook and his sister sent to California to live with their mother Wanda and her new family.¹⁶

Escaping his grandparents did little to improve life for Cook or Debrah.

⁹ PCR Ex. 1, ¶ 18.

¹⁰ PCR Ex. 7, ¶ 10; PCR Ex. 1 ¶ 19.

¹¹ PCR Ex. 8, ¶ 7.

¹² PCR Ex. 1, ¶ 21.

¹³ PCR Ex. 8, ¶ 9; PCR Ex. 7, ¶ 13; Letter from Patricia Golembieski, Clemency Ex.26.

¹⁴ Clemency Ex.7, ¶ 6.

¹⁵ PCR Ex. 7, ¶ 13.

¹⁶ PCR Ex. 1, ¶ 22; PCR Ex.8 ¶ 9.

Their stepfather believed “they had bad genes or were from bad seed.”¹⁷ They were treated as outcasts.¹⁸ Cook’s stepfather was vicious with a belt, beat Cook, and yelled at him regularly.¹⁹ 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.²⁰ 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.²¹

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.²² Wanda sexually abused one of her stepsons.²³ Cook’s sister and stepsister were sexually abused by their stepbrothers.²⁴ Cook’s stepfather asked his own daughter, Cook’s stepsister, to have sex with him.²⁵

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.²⁶ While Cook was growing up, she attempted suicide on numerous occasions.²⁷ 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.

¹⁷ Clemency Ex. 26.

¹⁸ Clemency Ex. 26; PCR Ex. 8, ¶ 10; PCR Ex. 7, ¶ 13.

¹⁹ PCR Ex. 8, ¶¶ 10, 13; PCR Ex. 7, ¶ 13.

²⁰ Clemency Ex. 7, ¶ 6.

²¹ PCR Ex. 8, ¶ 13.

²² PCR Ex. 1, ¶ 27.

²³ Clemency Ex. 7, ¶ 5.

²⁴ PCR Ex. 8, ¶ 17.

²⁵ Clemency Ex. 26.

²⁶ PCR Ex. 8, ¶ 5; PCR Ex. 7, ¶ 17.

²⁷ PCR Ex. 1, ¶ 28; PCR Ex. 8, ¶ 11.

After Wanda's suicide attempts, Cook's stepfather would blame Cook and his sister, telling them it was their fault that their mother wanted to kill herself.²⁸

When he was not quite fifteen, Cook's mother gave custody of him to the State of California.²⁹ 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.³⁰

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.³¹ 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.³² 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."³³ Bennett admits to masturbating Cook and having him perform oral sex.³⁴ At McKinley, there was a "peek-a-boo room" which was used for "time outs."³⁵ 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.³⁶ Cook was forced to spend time in the "peek-a-boo room," naked and

²⁸ PCR Ex. 1, ¶ 28; PCR Ex. 8, ¶ 11.

²⁹ Declaration of Wanda Dunn, PCR Ex. 5, ¶ 14; McKinley Children Center Records, 1976-77, Clemency Ex. 45.

³⁰ Clemency Ex. 8, ¶ 7.

³¹ Clemency Ex. 45.

³² Declaration of Howard Smith Bennett, Clemency Ex. 19, ¶ 5.

³³ *Id.*, ¶ 6.

³⁴ *Id.*, ¶ 6.

³⁵ Declaration of David Overholt, Clemency Ex. 17.

³⁶ The administrator during Cook's time at McKinley was dismissed after allegations regarding sexual misconduct arose.

handcuffed to the bed, while Bennett would sexually abuse him.³⁷ Cook was even circumcised at age fifteen,³⁸ at the instruction of Bennett. Unsurprisingly, Bennett is now a registered sex offender in California,³⁹ 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.⁴⁰

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.⁴¹ Cook ran away from McKinley on several occasions.⁴² 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.⁴³

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.⁴⁴ In fact, Cook first learned that his family had moved when he was put on a Greyhound bus to Lake Havasu for a family holiday. Cook wrote about how his mother's repeated rejection and

³⁷ PCR Ex. 1, ¶ 30.

³⁸ Clemency Ex. 45.

³⁹ *California v. Bennett*, State of California Department of Justice, *Megan's Law Homepage*, Photograph of Howard Bennett, Clemency Ex. as Ex. 21.

⁴⁰ "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.

⁴¹ PCR Ex. 1, ¶ 31.

⁴² Clemency Ex. 45.

⁴³ PCR Ex. 1, ¶ 31.

⁴⁴ Clemency Ex. 45.

abandonment deeply affected him.⁴⁵ In his poem titled “I Remember,” Cook wrote, “I also remember many nights talking with my mother on the phone and asking if I could return home . . . I remember the answers she gave me, they always made me cry.”⁴⁶

After leaving McKinley at age sixteen, Cook spent his last two years as a child bouncing from group home to group home.⁴⁷ Even though Cook had escaped McKinley, he still did not escape his abuser. Bennett tracked him down at another group home and met with him.⁴⁸ 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.⁴⁹ Tom Maas, who has fostered over fifty children, says that Cook was one of his “top kids.”⁵⁰ Lisa Maas loved Cook very much and knew that his childhood was “a nightmare.”⁵¹ Cook excelled in the structured environment of the group home.⁵² He had a dry sense of humor, and loved nature and photography.⁵³ 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

⁴⁵ Selected Poetry from 1981, Clemency Ex. 28.

⁴⁶ A Melody of Hope by Daniel Cook, Poem Published in the Book “*Out of the Night*,” Clemency Ex. 29.

⁴⁷ 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.

⁴⁸ Clemency Ex. 19, ¶ 7.

⁴⁹ PCR Ex. 1, ¶ 36.

⁵⁰ Declaration of Thomas Monroe Maas, Clemency Ex. 9, ¶ 4.

⁵¹ Letter to the Clemency Board from Lisa Maas, Clemency Ex. 22.

⁵² Clemency Ex. 9, ¶ 4.

⁵³ *Id.*, ¶ 5.

was provided.⁵⁴

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.⁵⁵

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 he lacked the ability "to adjust to the stress of military life, as evidenced by [his] . . . self-inflicted injury."⁵⁶

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.⁵⁷ 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.⁵⁸ Within a year, Cook moved and was living in Wyoming, where he again attempted suicide.⁵⁹ He was treated at the Wyoming State Hospital for depression and alcoholism. After being discharged, he returned to Idaho.

⁵⁴ Clemency Ex. 8, ¶ 7.

⁵⁵ PCR Ex. 1, ¶ 37; Clemency Ex. 10, ¶¶ 12-13.

⁵⁶ Army Records, 1979-80, Clemency Ex. 41.

⁵⁷ Wyoming State Hospital Records, Clemency Ex. 40; Idaho State Hospital Records, 1981-82, Clemency Ex. 39; Clemency Ex.10, ¶ 17.

⁵⁸ Clemency Ex. 10, ¶ 17.

⁵⁹ Clemency Ex. 40.

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.”⁶⁰

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 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.⁶¹

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.⁶² 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.”⁶³ Between 1983 and 1987, Cook was regularly seen by mental health professionals for various reasons, including depression, acute psychosis, and

⁶⁰ Clemency Ex. 39.

⁶¹ *Id.*

⁶² Clemency Ex. 11, ¶ 4.

⁶³ *Id.*, ¶ 5.

alcoholism.⁶⁴

Because of his mental health issues, Cook had a hard time keeping a job.⁶⁵ Once, Patti saw Cook living under a bridge, filthy and hungry.⁶⁶ She describes Cook as “a beaten, broken individual—it was as if you took the spirit out of a dog.”⁶⁷ Cook lived a very sad life.⁶⁸

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 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.⁶⁹

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.⁷⁰ Longing

⁶⁴ 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.

⁶⁵ Clemency Ex. 11, ¶ 6.

⁶⁶ *Id.*, ¶ 7.

⁶⁷ *Id.*, ¶ 2.

⁶⁸ *Id.*, ¶ 8.

⁶⁹ Telephone interview, Mar. 21, 2009 (no transcript available), reported in Clemency Petition.

⁷⁰ Ex. 43, at 4.

for Barbara, Cook counted the days since their break up on his calendar.⁷¹ Cook also wrote letters to Barbara and her children, which were never delivered.⁷² In his letters, he expressed his regrets and his hope that they could be a family again one day.⁷³ 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.”⁷⁴

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.⁷⁵ Cook’s damaged and fragile brain, which had been exposed to multiple traumatic events since childhood, could not process the overwhelming losses he had suffered. 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 Carlos Froylan Cruz-Ramos and Kevin Swaney.

C. **The Crime.** Intoxicated on drugs and alcohol, and aided by his codefendant and roommate John Matzke, Cook was responsible for the deaths of Cruz-Ramos and Swaney. 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

⁷¹ Cook’s Calendar 1987, Clemency Ex. 32.

⁷² Cook’s Letters, 1987, Clemency Ex. 31.

⁷³ *Id.*

⁷⁴ Report of Eugene R. Almer, M.D, 1987, Superior Court Record, *State v. Cook*, at 3.

⁷⁵ Psychological Evaluation of John Matzke, Daniel W. Wynkoop, Ed.D., Ex. Clemency Ex.35 at 4.

sentenced to death.⁷⁶ Matzke, however, provided a statement to the police and “was extremely descriptive regarding the events” surrounding the crime.⁷⁷

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.⁷⁸ According to Matzke, Cook appeared “crazy,” with a “crooked smile,” and he was “drooling.”⁷⁹ Matzke also said that Cook accused Carlos of being a spy, and made references to the CIA and Oliver North. Cook kept asking Carlos to take him to his leader. These persecutory statements were not reality based; they were a symptom of Cook’s psychotic state.⁸⁰

D. Cook’s Prosecution. Cook was tried and sentenced in rural Mohave County, Arizona. Cook was indigent, so the trial judge appointed lawyer Claude Keller to represent him. Keller was a known alcoholic without the experience or professional capability to handle a felony case, let alone a complex capital case such as Cook’s.⁸¹ In the months after the indictment, Keller did virtually no investigation, and developed no theory of defense or plan for mitigation.⁸² This

⁷⁶ Report of Eugene R. Almer, M.D, 1987, Superior Court Record, *State v. Cook*, at 5.

⁷⁷ Psychological Evaluation of John Matzke, Daniel W. Wynkoop, Ed.D., Clemency Ex.35 at 3.

⁷⁸ PCR Ex. 1, ¶ 92.

⁷⁹ Interview of John Matzke, December 17, 1987, Clemency Ex. 36 at 41.

⁸⁰ PCR Ex. 1, ¶ 92.

⁸¹ Affidavit of Prosecutor Eric Larsen, November 22, 2010, record, *State v. Cook*; see also *State v. Cook*, Transcript of Post-Conviction Hearing 12/02/94, Testimony of attorney Michael Burke, (Keller was “absolutely not competent to handle capital cases.”); Testimony of attorney Ronald Wood, at 62-67 (“I can recall having a conversation with Judge Conn wherein he indicated that he didn’t think Claude was doing a very good job. . . . [H]e didn’t think Claude was one of these lawyers who was going to be able to handle complex things.”); Testimony of attorney Mary Ruth O’Neill, at 21-23 (“[W]hile Claude may have been competent to do some things like misdemeanors, . . . he was not competent to represent a defendant in a complex criminal case.”).

⁸² Affidavit of Daniel Cook, September 3, 1993, record *State v. Cook*.

failure was an obvious violation of Cook's Sixth Amendment right to effective counsel.⁸³ Cook also smelled alcohol on Keller's breath in court.⁸⁴ Because Cook was worried that no defense was being prepared by Keller, he filed a motion to waive counsel. At that time, Cook was not aware that instead of representing himself, he could have asked for appointment of a different attorney.⁸⁵

Without asking Cook why he wanted to waive his right to counsel, the judge granted his motion.

After he was convicted, Cook was left with the challenge of preparing for sentencing in a capital case. This was a feat that even the judge had recognized as impossible for a defendant representing himself. In fact, in a previous death penalty sentencing that occurred only months before Cook's case, when the defendant wanted to represent himself at sentencing, Judge Conn stated that there was no "way that you can possibly *under the consequences* have self representation."⁸⁶

Cook asked the judge for an expert to prepare his mitigation case for sentencing. Cook told the judge "I feel that every aspect of my life, past history, illnesses and so forth should be reviewed by the Court through expert testimony before sentence is passed down."⁸⁷ Judge Conn denied Cook's request. Cook was unaware that he could present mitigating evidence in other ways; he thought an

⁸³ It is well-settled that when representing capital defendants, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

⁸⁴ Affidavit of Daniel Cook, September 3, 1993, record *State v. Cook*.

⁸⁵ *Id.*

⁸⁶ *State v. Henry*, Transcript of Pre-Sentence Hearing, 1/6/88, Clemency Ex. 51 (emphasis added).

⁸⁷ *State v. Cook*, Transcript of Request for Expert Assistance, 8/4/88, at 2-3.

expert witness was the only available option.⁸⁸

At his sentencing, frustrated and full of despair, Cook said, “Only sentence I will accept from this Court at this time is the penalty of death.”⁸⁹ This was not the considered decision of a competent and fully-informed man. Indeed, only four days before, Cook told the court: “being convicted of these charges was a traumatic experience. It has screwed up my head considerably since then.”⁹⁰

The court found three aggravating circumstances for the murder of Cruz-Ramos. The court also found two aggravating circumstances for Swaney’s murder. The judge found no mitigating circumstances.⁹¹ The judge sentenced Cook to death—twice—with the sentences to be served consecutively.⁹²

E. Compelling Mitigation Would Have Made a Difference.

Because Cook’s request for an expert to prepare for sentencing was denied, no testimony was presented regarding Cook’s mental illnesses or his abusive background. While the Court was aware of limited information about mental illness issues and suicide attempts in doctors’ reports submitted to the Court before trial on the issue of his competence, the evidence of Cook’s horrific childhood and the resulting mental illnesses that he suffers was completely undeveloped.

⁸⁸ *Id.* at 5 (When told the court was denying his request, Cook responded “I’m not an expert in this field. I don’t even know where to go on this anymore.”).

⁸⁹ *State v. Cook*, Transcript of Sentencing, 8/8/88 at 4.

⁹⁰ *State v. Cook*, Transcript, 8/4/88 at 4.

⁹¹ *State v. Cook*, Transcript of Sentencing, 8/8/88, at 22. The trial court discounted the limited information it had about Cook’s mental health history on the grounds that his previous suicide attempts were not linked to the crime. In requiring a causal link between the mitigating evidence and the crime itself, the judge imposed an unconstitutional test. *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (holding that the Eighth Amendment requires that capital sentencing body must be allowed opportunity to consider relevant mitigating evidence even if defendant cannot establish nexus between such evidence and the crime); *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2010) (holding that the Arizona Supreme Court’s imposition of a nexus requirement was unconstitutional).

⁹² *State v. Cook*, Transcript of Sentencing, 8/8/88 at 23.

At the time of the crime, Cook suffered from post-traumatic stress disorder (PTSD) and organic brain dysfunction (diagnosed as organic mental syndrome, not otherwise specified).⁹³ Had this information about his mental illnesses, his childhood abuse and neglect, been presented to him before trial, the attorney who prosecuted Cook has said he would not have sought the death penalty.⁹⁴

Donna Schwartz-Watts, M.D., a psychiatrist with a background in evaluating and treating people with sexual abuse, conducted an extensive review of Cook's history, evaluated him several times in 2010, met with his mother, and consulted with neuropsychologist Tora Brawley, Ph.D.⁹⁵ As discussed in great detail in her declaration, Cook had a childhood replete with sexual and physical abuse.⁹⁶ This continual traumatic abuse caused Cook to develop PTSD.⁹⁷ Cook has daily thoughts and flashbacks about the trauma he endured. He does not like being hugged and reacts to certain smells and loud noises.⁹⁸ He feels detached, has difficulty trusting others, and has always had few friends.⁹⁹ Cook exhibits typical symptoms of PTSD sufferers including his hyper vigilance and impulsivity.¹⁰⁰ Cook has also descended into multiple substance addictions, a common complication of PTSD.¹⁰¹

Cook also had a significant history of impairments in cognitive functioning, including being in special education classes as a child and having seizures as a

⁹³ See PCR Ex. 3; Letter from Tora Brawley, Ph.D. to Robin Konrad, dated Sept. 30, 2010.

⁹⁴ Declaration of Eric Larsen, PCR Ex. 2.

⁹⁵ PCR Ex. 1, ¶¶ 6, 8, 10, 12.

⁹⁶ *Id.*, ¶¶ 18, 19, 21, 26, 27, 30, 31.

⁹⁷ *Id.*, ¶¶ 81-86.

⁹⁸ *Id.*, ¶ 83.

⁹⁹ *Id.*, ¶ 84.

¹⁰⁰ *Id.*, ¶ 85.

¹⁰¹ *Id.*, ¶ 78.

young adult.¹⁰² Causes for his cognitive impairments include being exposed to alcohol *in utero*, being born three months prematurely, being physically abused as an infant, sustaining head injuries, and abusing substances and overdosing on medications.¹⁰³ Based on this information, coupled with the complete neuropsychological exam conducted by Dr. Brawley, Cook has been diagnosed with organic mental syndrome, not otherwise specified.¹⁰⁴ In layman's terms, Cook is brain damaged. Cook suffers from clinical symptoms associated with brain dysfunction such as migraines and memory loss and is medicated for seizures.¹⁰⁵ Dr. Brawley found that Cook's frontal lobe dysfunction was present at the time of the crime. This is critical information, as frontal lobe dysfunction, combined with the use of drugs and alcohol, would have very likely rendered him more susceptible to poor judgment and impulsivity, and contributed to the circumstances of his crime.¹⁰⁶

The facts about these serious mental conditions are integral to understanding the nature and circumstances of the offense. As awful as these crimes were, they emulate much of the abuse that Cook suffered as a child. "PTSD affects the way you see, think about, and respond to people and situations."¹⁰⁷ Cook's illness affects his understanding of reality, his perception of surroundings, and his reactions to otherwise normal events – his understanding of the world and the events that

¹⁰² *Id.*, ¶¶ 75, 77; PCR Ex. 3 at 3 (noting that Dr. Wynkoop's test results demonstrated indicators of frontal lobe dysfunction).

¹⁰³ PCR Ex. 1, ¶¶ 15, 16, 37-40, 46, 47, 49, 57, 58, 62, 73.

¹⁰⁴ PCR Ex. 1, ¶¶ 87-89; PCR Ex. 3 at 3-4.

¹⁰⁵ *Id.*, ¶ 89.

¹⁰⁶ PCR Ex. 3, at 4.

¹⁰⁷ *Criminal Behavior and PTSD*, <http://www.ptsd.va.gov/public/pages/ptsd-criminal-behavior.asp> (last visited March 27, 2011).

transpire are different from ours *every day*.¹⁰⁸ Coupled with his brain damage and excessive abuse of drugs and alcohol, the trauma of Cook's life played out in this offense: the horrors that Cook suffered, Cruz-Ramos and Swaney suffered. Cook's serious mental illness, caused by a life of unimaginable abuse, does not excuse Cook's conduct or the tremendous loss his actions caused to both men's families, but does offer a context to understand them. Society has long recognized that criminal acts may be less culpable where they can be attributed to a disadvantaged background, or to "emotional or mental problems."¹⁰⁹

This information, never developed before Cook's sentencing, is critical to the fair outcome of Cook's case. Eric Larsen, the trial prosecutor, has said: "Had I been informed of this mitigating information regarding Cook's severely abusive and traumatic childhood and his mental illnesses, I would have not sought the death penalty in this case."¹¹⁰ Larsen has also said that had he known about Cook's background, "it certainly would have explained his behavior. In fact, the childhood abuse he suffered mirrored the circumstances surrounding the crime. I would have, therefore, not been in favor of seeking a death sentence in his case."¹¹¹

F. Post Conviction Proceedings in Arizona Capital Cases.

In Arizona the post conviction proceeding "is part of the original criminal action and not a separate action." Ariz. R. Crim. P. 32.3. For a capital case, it is not

¹⁰⁸ See Davidson, Michael J., *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415, 422 (1988).

¹⁰⁹ *California v. Brown*, 479 U.S. 438, 545 (1987) (O'Connor, J. concurring).

¹¹⁰ PCR Ex. 1, ¶ 9.

¹¹¹ *Id.*, ¶ 10.

a discretionary review to be filed by a defendant. It is mandatory. After affirmance of the appeal, pursuant to Ariz. Rev. Stat. Ann. § 13-4234 D a post conviction proceeding “shall” be initiated by the Arizona Supreme Court. *Accord*, Ariz. R. Crim. P. 32.4(a). The Arizona Supreme Court appoints counsel to represent defendant, and establishes prerequisites to be met by any counsel so appointed. Ariz. Rev. Stat. Ann. § 13-4041 B (1996). The preference of the defendant is not one of those prerequisites, except that the Court may appoint previous counsel with defendant’s consent.

In Arizona the only forum for reviewing claims of ineffectiveness is the post conviction proceeding. *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002)(discussing Arizona Supreme Court’s ever more peremptory direction to counsel to raise ineffectiveness claims by post conviction proceedings). But under *Murray v. Giarratano*, 492 U.S. 1 (1991), and *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996), there is no federal constitutional right to effective post conviction counsel.

G. Petitioner’s Automatic Post Conviction Proceeding.

Petitioner’s representation was constitutionally ineffective in his first post conviction proceeding. Petitioner alleged that even though he had taken over his own representation shortly before trial, his appointed counsel’s ineffectiveness tainted the entire proceeding.¹¹² Petitioner’s post conviction counsel initiated this

¹¹² Ineffectiveness of counsel during his representation before a defendant takes over his own case can be grounds for relief if it causes prejudice to defendant. This Court said in *Faretta v. California*, 422 U.S. 806, 824 fn. 46 (1976) that a self-representing defendant could not use the quality “of his own defense” to mount an ineffectiveness claim. *Id.* (Emphasis added.) This Court did not say there could never be an ineffectiveness claim against counsel who did represent a prisoner at other stages of his prosecution. Indeed, many cases hold that there *can* be such a claim, if it meets both the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668 (1984). *E.g. United*

ineffectiveness claim, but failed to complete it by filing a motion in the trial court, which was necessary to complete the claim and make it reviewable by the Arizona Supreme Court.¹¹³

Petitioner's first post conviction counsel also was constitutionally ineffective as to a second claim. He failed to assert the ineffectiveness of direct appellate counsel, for not including as an issue on appeal the trial court's refusal of expert assistance requested by defendant for mitigation purposes. While Petitioner had included ineffectiveness of counsel in an initial filing before his counsel was appointed, counsel did not articulate any ground for the claim. Further, post conviction counsel never sought the appointment of an expert or mitigation investigator in order to develop the "prejudice" prong of the claim that appellate counsel was ineffective. The latter failure was one of the bases upon which the trial court denied relief in the proceeding for which this petition is filed. *See* § I, *infra*.

H. Petitioner's Additional Attempts to Have a Mitigation Case Investigated.

Given the one year statute of limitations upon the filing of federal habeas corpus petitions imposed by 28 U.S.C. § 2244(d)(1), Petitioner next filed such a petition. He was unsuccessful in obtaining any relief on the ineffectiveness of trial and appellate counsel claims. The United States District Court for the District of

States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); *State v. Dunster*, 278 Neb. 268, 276, 769 N.W.2d 401, 408 (2009); *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 186 (1988). Here, appointed counsel's failure immediately to undertake the investigation and preparation of a mitigation case – a task that is very time consuming, and virtually impossible for a defendant to accomplish from a jail cell, starting only weeks before trial – severely prejudiced Petitioner.

¹¹³ In *State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991) the court held that under then-applicable Rule 32.9, Ariz. R. Crim.P., only claims preserved in a motion for rehearing following denial of post-conviction relief by the trial court could be reviewed on appeal.

Arizona held these claims precluded for want of exhaustion, applying the rule of *Murray v. Giaratano*, 492 U.S. 1 (1989), to deny Petitioner's claim that the constitutional ineffectiveness of his post conviction counsel constituted "cause" to excuse the want of exhaustion. The Ninth Circuit affirmed. *Cook v. Schriro*, 538 F.3d 1000 (9th Cir. 2008). This Court denied certiorari of a petition raising the issue of ineffectiveness of post conviction counsel as cause excusing failure to exhaust his claims. *Cook v. Schriro*, No. 129 S.Ct. 1023 (2009).

The federal habeas proceedings began in 1997 and were completed in 2009. Upon their completion, Petitioner, observing the evolution of federal and state case law respecting the right to counsel,¹¹⁴ concluded that he was entitled to again seek post conviction relief in the Arizona Courts. Ariz. R. Crim. P. 32.1 lists several grounds for relief which may be brought in a subsequent post conviction proceeding. One of them is that "There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Ariz. R. Crim P. 32.1(g). Petitioner filed a second post conviction proceeding in the Arizona Superior Court, and defended against the state's argument that the claim was precluded, by contending that, given the evolution of Arizona and federal case law related to the right to counsel in proceedings subsequent to a trial or direct appeal, the issue reserved by this Court in *Coleman v. Thompson*, 501 U.S. 722 (1991) applied. But the Arizona Superior Court and Supreme Courts disagreed. Petitioner sought certiorari from this Court,

¹¹⁴ *Halbert v. Michigan*, 545 U.S. 605 (2005); *Massaro v. United States*, 538 U.S. 500 (2003); *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006).

which was denied. *Cook v. Arizona*, 131 S.Ct. 178 (2011).

I. Comprehensive Mitigation Investigation Conducted by the Federal Public Defender in 2010.

Upon remand of Petitioner's federal habeas corpus case, lawyers from the Capital Habeas Unit of the Federal Public Defender in Arizona were appointed as additional counsel for petitioner.¹¹⁵ They promptly enlisted necessary mitigation investigators, and ultimately medical and psychiatric experts, to prepare a mitigation case. This should have occurred in 1988, or at least within a short time thereafter, had Petitioner had competent counsel for his trial and appeal. More pertinent to this case, had Petitioner received effective counsel in his first post conviction proceeding to redress the ineffectiveness of his trial and appellate counsel, a mitigation investigation could have occurred twenty years ago, followed by the potential resentencing of Petitioner.

Until the mitigation case begun in 2009 was completed in 2010, almost nothing of what has been described above, ¶¶ A and B, about Petitioner's life, abuse, or addiction problems were known, let alone considered by the sentencing judge. Perhaps more importantly, until 2010, Petitioner's very serious mental problems, post-traumatic stress disorder and organic brain dysfunction had not been diagnosed. Thus, Petitioner's diagnoses of PTSD and organic brain dysfunction, along with the full extent of his abusive childhood, addiction problems

¹¹⁵ The appointment was made in order to provide Petitioner with counsel experienced in litigating applications for warrants of execution, clemency proceedings, and other types of proceedings typical of the period when execution of a prisoner looms, under the authority of 18 U.S.C § 3599. The mitigation investigation was commenced by the Federal Public Defender to prepare for clemency proceedings. When the full dimension of Petitioner's life, abuse, and mental illnesses became apparent, the proceeding from which this case arises was initiated.

and suicidal tendencies qualified as “newly discovered evidence.” The Arizona Criminal Rules recognize “newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence” as grounds to avoid preclusion of a claim that was not included in the first post conviction proceeding, permitting its consideration in a successive one. Ariz. R. Crim. P. 32.1 (e). Therefore, in December of 2010 Petitioner filed a post conviction proceeding, seeking reconsideration of his sentence on the ground that the newly discovered evidence would have probably yielded a sentence of life, rather than death.

In order to claim the benefit of “newly discovered evidence” a Petitioner must show that he exercised diligence in seeking to discover that evidence. Ariz. R. Crim. P. 32.1 (e)(2). The State contended that Petitioner could *not* show diligence, because no attempt had been made to obtain a mental health expert, or otherwise investigate or develop a mitigation case, in Petitioner’s first post conviction proceeding. Petitioner defended against that contention by asserting that the court should recognize Petitioner’s right to have his post conviction counsel fulfill the Sixth Amendment guarantee of effectiveness, and that counsel’s failure to do so during the first post conviction proceeding should not be charged against Petitioner as a lack of diligence. The Superior Court rejected that argument and dismissed the petition.

Petitioner also preserved, and again pressed, his issue that his claims of ineffectiveness of trial and appellate counsel were not precluded under

Ariz. R. Crim. P. 32.2 as not validly raised in Petitioner's first post conviction proceeding, due to the constitutional ineffectiveness of his post conviction counsel. The Superior Court rejected that argument, as well.

The Arizona Supreme Court denied a timely petition for review.

Thus, the issue reserved by this Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), whether a prisoner is entitled to competent counsel to assert a claim of ineffective assistance of counsel in a post conviction proceeding, is implicated by two separate aspects of Petitioner's case. The first is whether ineffective post conviction counsel excuses any lack of diligence in seeking mitigation information in the first post conviction proceeding. The second is whether ineffective post conviction counsel excuses the normal preclusion rule of Ariz. R. Crim. P. 32.2. In each instance, the Arizona courts rejected the federal right to constitutionally effective post conviction counsel, thus rejecting the predicate for each of Petitioner's arguments to avoid claim preclusion in a successive post conviction petition.

J. The Federal Constitutional Issue was Properly Raised in Both the Trial Court and the Arizona Supreme Court, the Rulings of Which Were Based on Federal Law, Not an Independent State Ground.

Petitioner raised the Sixth and Fourteenth Amendment right to have post conviction counsel conform to Sixth Amendment standards before the Superior Court: "[B]ecause [Petitioner] was denied the effective assistance of counsel in his first post conviction proceeding, in violation of the Sixth and Fourteenth

Amendments to the United States Constitution, and the Arizona Constitution, the claim presented here cannot be held precluded under Ariz. R. Crim. P. 32.2(a).” Reply to State’s Response, first raising preclusion, January 20, 2011, ¶ 6. The claim was re-asserted and discussed in Petitioner’s Motion for Rehearing in the Superior Court, February 2, 2003, ¶ 4.

He raised that claim in the Arizona Supreme Court in his Petition for Review, March 8, 2011, in Issue 3 at p. 5. He raised it in his Reply on Petition for Review, March 21, 2011, at p. 4, Argument 2.

The Arizona Courts’ denial of a Sixth Amendment right to counsel in this case was a decision upon federal law, even though the federal issue in the context of resolving state law of preclusion or diligence in seeking evidence.

When resolution of a state procedural law question depends upon a predicate federal constitutional understanding, the state law prong of the court’s holding is not independent of federal law, and a federal court may address the merits of the claim. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Smith v. Texas*, 550 U.S. 297, 315 (2007)(a state court’s predicate “error of federal law” in resolving a state procedural question does not preclude federal review); *Delaware v. Prouse*, 440 U.S. 648, 652 – 53 (1979)(state court decision is not based on an independent state ground where the resolution of a state law question involves an interpretation of what federal law requires to state a claim for relief).

REASONS FOR GRANTING THE WRIT

This case presents an important question about the constitutional right to counsel in death sentence litigation. The performance of counsel in defense of death sentence prosecutions has created pervasive and recurring problems. A high percentage of judgments imposing death sentences are vacated or reversed because of the ineffective assistance of counsel at trial or on direct appeal. An unacceptably large proportion of such relief occurs in federal habeas corpus proceedings, and occurs ten, fifteen or even twenty years after the conviction. Such delay frustrates the goal of fair and prompt determination of the validity of death sentence judgments. Because relief granted so long after judgment frequently issues from federal courts, that delay also dilutes or even frustrates the important principle of federalism under which state courts should not only adjudicate death sentences, but vindicate federal rights, as much as possible.

Arizona along with twenty-two other states and the federal government now assign consideration of whether a defendant received ineffective assistance of counsel to post conviction proceedings. This is logical, because adjudicating the effectiveness of trial counsel under *Strickland v. Washington*, 466 U.S. 688 (1984), cannot be done on a record consisting only of what occurred in court. A fuller record must be developed. It is also self evident that the effectiveness of appellate counsel cannot be measured until the appeal has been concluded. Among the stages of a prosecution at which this Court has recognized a defendant's constitutional right to counsel is the first review granted a defendant as a matter of right, from his

conviction and sentence. *Douglas v. California*, 372 U.S. 353 (1963). Further, of course, defendant is entitled to have that counsel meet the *Strickland* standard of effectiveness. *Evitts v. Lucey*, 469 U.S. 387 (1985). Yet although recognizing a right to counsel in virtually every other significant stage of a criminal prosecution, this Court has never recognized that right when the claim may only be asserted in a post conviction proceeding, as is the case here where Petitioner's injury was caused by ineffective assistance of counsel. While this Court has held that, generally, there is no right to counsel in post conviction proceedings, it has recognized that there could be an exception to that rule for a post conviction proceeding for claims that can only be brought there. *Coleman v. Thompson*, 501 U.S. 722 (1991). Not to recognize such a right squarely conflicts with *Douglas* and *Evitts*.

There are several reasons why the issue presented by this case is of sufficient importance to merit review by this Court.

I. THE RIGHT TO COUNSEL ISSUE RAISED HERE INVOLVES VIRTUALLY THE LAST SIGNIFICANT STAGE OF PROSECUTION FOR WHICH THIS COURT HAS NOT DEFINITELY ESTABLISHED A RULE. MOREOVER, STATE AND FEDERAL COURTS HAVE GIVEN DIFFERING TREATMENT TO COLEMAN'S RESERVATION OF THE ISSUE.

Under Arizona's procedure, this case involves a stage of prosecution which is both mandatory for a capital case, and essential to a first review of the effectiveness of counsel. It is anomalous that this Court has not decided whether, under these two circumstances, a right to counsel exists. While "the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death," *Murray v. Giarratano*, 492 U.S. 1, 8 (1989), this Court has

declined to impose “heightened procedural requirements” for other stages. *Id.*, p. 10. Petitioner does not here argue otherwise. The significance of noting the capital nature of the process is in the fact that *Arizona* has chosen to make the post conviction proceeding a mandatory and integral part of the prosecution for such cases, but not lesser crimes. Ariz. Rev. Stat. Ann. § 13-4234(D). This, Petitioner urges, is one significant reason to recognize the importance of the right to counsel — the importance Arizona attaches to the post conviction proceeding.

Over the last three quarters of a century, this Court has considered the issue of the right to counsel in various types and for various stages of criminal prosecutions. Almost without exception, a right to counsel has been recognized. See *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); *Douglas v. California*, 372 U.S. 353 (1963)(direct appeals); *White v. Maryland*, 373 U.S. 59 (1963)(entering guilty plea); *In re Gault*, 387 U.S. 1 (1967)(in juvenile proceeding); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (for misdemeanors if facing any incarceration); *Miranda v. Arizona*, 384 U.S. 436 (1966)(post arrest interrogation); *United States v. Wade*, 388 U.S. 218 (1967)(identification lineups); *Moore v. Illinois*, 434 U.S. 220 (1977)(one-person showups); *Coleman v. Alabama*, 399 U.S. 1 (1970)(preliminary hearings); *Hamilton v. Alabama*, 368 U.S. 52 (1961)(arraignments).

Of particular relevance to this case, of course, is the evolution of the right to counsel for appeals. In *Douglas v. California*, 372 U.S. 353 (1963), this Court held that an indigent prisoner was entitled to the assistance of counsel on his first

appeal as of right. It was later confirmed that this means the *effective* assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). However, there is no right to counsel for a purely discretionary appeal. *Ross v. Moffitt*, 417 U.S. 600 (1974). In *Ross*, the defendant's conviction was affirmed by an intermediate appellate court. He then sought discretionary review by the state supreme court. This Court held that all the state needs to do is provide a prisoner with "an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* at 616.

Throughout the time when the foregoing cases were decided, a state habeas corpus or post conviction proceeding was treated as a separate, usually civil, proceeding, thus not warranting a right to counsel. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giaratano*, 492 U.S. 1 (1989); *Coleman v. Thompson*, 501 U.S. 722 (1991). But in *Coleman* this Court expressly noted the potential for "an exception to the rule of *Finley* and *Giaratano* in those cases where state collateral review is the first forum in which a prisoner can present a challenge to his conviction." *Id.* at 755. In *Coleman* this Court did not address that issue 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. In addition, of course, here there is no issue of whether the proceeding is discretionary or not, which was an important consideration in *Ross*, *supra*.

It is important to review this case because the state and federal courts have dealt with the issue in differing ways. The predominant approach has been to decline to determine whether *Coleman's* rule is subject to this exception. *E.g. Mackall v. Angelone*, 131 F.3d 442, 451 (4th Cir. 1997)(holding no right to counsel, citing *Coleman's* reservation of the issue, but concluding that it could not address it); *Martinez v. Johnson*, 255 F.3d 229, 240-41 (5th Cir. 2001)(citing *Coleman* and holding that precedent required it to answer the reserved question in the negative, relying on *Callins v. Johnson*, 89 F.3d 210 (1996) which did not decide the reserved issue); *Sweet v. Delo*, 125 F.3d 1144, 1151 (8th Cir. 1997)(holding no right to counsel, citing *Coleman* but not recognizing reserved issue nor discussing whether ineffectiveness of trial counsel could only have been raised in post conviction); *Arthur v. Allen*, 452 F.3d 1234, 1249 (11th Cir. 2006)(deciding no right to counsel, citing *Coleman* but not recognizing issue was reserved there); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996)(misapplying *Coleman* holding to situation reserved in *Coleman*).

The Ninth Circuit has an intra-circuit conflict on the issue. In *Bonin v. Caldero*, *supra*, it held that there was *not* an exception. In *Moormann v. Schriro*, 426 F.3d 1044, 1058 – 59 (9th Cir. 2005), however, it held that there *was*, an exception, albeit under unusual circumstances that have no bearing on whether the right to counsel should generally be recognized. 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. Thus, *Moormann* does conflict actually with *Giarratano*, and Arizona has adopted a rule mirroring *Moorman, supra*. *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006).

But the Fifth Circuit has reached the opposite conclusion from the Ninth Circuit's *Moorman* holding. *Martinez v. Johnson*, 255 F.3d 229, 240 (5th Cir. 2001). Martinez, like Moorman, argued that because his trial counsel also represented him in post conviction proceedings, he in effect did not receive effective post conviction counsel. The Fifth Circuit, disagreeing with the Ninth Circuit, held otherwise.

The persistence of lower court denials of counsel in the face of this Court's reservation, rather than resolution, of the issue in *Coleman* is anomalous in light of the fact that cases of this Court decided after *Coleman* suggest a recognition of the right to counsel.

Cases of this Court more recent than *Finley*, *Giarratano* and *Coleman* demonstrate how the evolving role of post-conviction proceedings 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 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. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002)(discussing Arizona Supreme Court's ever more peremptory direction to counsel to raise ineffectiveness claims only in post conviction proceedings).

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 categoriz[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.

II. INEFFECTIVENESS OF TRIAL AND DIRECT APPEAL COUNSEL IN CAPITAL CASES IS COMMON. REVIEW IS WARRANTED OF AN ISSUE THAT ARISES IN NUMEROUS STATES, THE RESOLUTION OF WHICH MAY IMPROVE THE QUALITY OF CAPITAL LITIGATION.

Death sentences are frequently overturned. The United States Department of Justice has reported that in the twenty-five years between 1973 and 1998, one of every three death sentences had been overturned. Tracy J. Snell, U.S. DEPT. OF JUSTICE, NCJ 179012, CAPITAL PUNISHMENT 1998 at 13. App. Table 1.¹¹⁶ More recently it has been reported that more like two out of three death sentences are vacated, either in state court direct review, state post conviction review, or in

¹¹⁶ Accessed at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=459> March 27,, 2011.

federal habeas corpus.¹¹⁷ Regardless which is right or if the number is somewhere in between, these are unacceptable error rates. In addition, since 1973, over 130 people have been released from death row with evidence of their innocence. This is one person for every nine executed during that time.¹¹⁸

Ineffectiveness of counsel is a major contributor to protraction of capital case litigation and results in frequent reversals. Just in the last two terms this Court's docket has involved this issue in numerous cases. *Jefferson v. Upton*, 130 S.Ct. 2217 (2010)(Counsel ineffective for failure to investigate traumatic head injury suffered as a child); *Wood v. Allen*, 130 S.Ct. 841 (2010)(State court denial of ineffectiveness claim at mitigation stage not unreasonable); *Smith v. Spisak*, 130 S.Ct. 676 (2010)(Reversing Sixth Circuit finding of ineffectiveness in summation); *Porter v. McCollum*, 130 S.Ct. 447 (2009)(Counsel ineffective for failure to satisfy obligation to conduct a thorough investigation of defendant's background); *Wong v. Belmontes*, 130 S.Ct. 383 (2009)(Reversing Ninth Circuit finding ineffectiveness for failure to investigate mitigation, finding no prejudice); *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009)(State court denial of ineffectiveness claim not unreasonable).

While several of the above-cited cases resulted in this Court finding no constitutional violation, it is apparent that ineffectiveness, at the sentencing stage of a capital case, is common. *E.g. Jefferson, supra; Porter, supra; Rompilla v. Beard*,

¹¹⁷ 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 (2006)

¹¹⁸ Staff Report, House Judiciary Subcommittee on Civil & Constitutional Rights, Oct. 1993, with updates from Death Penalty Information Center, reported in Death Penalty Information Center, September 20, 2010. Accessed at <http://www.deathpenaltyinfo.org/FactSheet.pdf> March 27, 2011.

545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Further, irrespective whether an ineffectiveness claim is ultimately found by this Court to lack merit, Petitioner submits that a constitutional rule that would increase the prospects for a valid determination of these claims in the state courts makes the consideration of the issue desirable.

The problem posed by the issue presented is not unique to Arizona. Twenty-three states and the federal government either require defendants to bring claims of ineffective assistance of counsel in a post conviction proceeding, or discourage them from raising such claims on direct appeal.¹¹⁹

The problem is not only widespread, it is profound. A committee of the Judicial Conference of the United States has recognized the pivotal importance of counsel in post conviction proceedings in capital cases. “[P]rovision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants.” Ad Hoc Committee on Federal Habeas Corpus in Capital

¹¹⁹ Alabama, *Jackson v. State*, 534 So.2d 689 (Ala. Crim. App.1988); Arizona, *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002); Arkansas, *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996); California, *People v. Mendoza Tello*, 15 Cal. 4th 264, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997); Connecticut, *State v. Patrick*, 42 Conn. App. 640, 681 A.2d 380 (1996); Florida, *Wuornos v. State*, 676 So.2d 972 (Fla. 1996); Idaho, *State v. Elison*, 135 Idaho 546, 21 P.3d 483 (2001); Iowa, *State v. Lucas*, 323 N.W.2d 228 (Iowa 1982); Kansas, *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986); Louisiana, *State v. Seiss*, 428 So.2d 444 (La. 1983); Maine, *State v. Barrett*, 577 A.2d 1167 (Me. 1990); Maryland, *Ware v. State*, 360 Md. 650, 759 A.2d 764 (2000); Massachusetts, *Commonwealth v. Adamides*, 37 Mass. App. Ct. 339, 639 N.E.2d 1092 (1994); Nevada, *Gibbons v. State*, 97 Nev. 520, 634 P.2d 1214 (1981); New Jersey, *State v. Preciose*, 129 N.J. 451, 609 A.2d 1280 (1992); New Mexico, *Duncan v. Kerby*, 115 N.M. 344, 851 P.2d 466 (1993); North Carolina, *State v. Dockery*, 78 N.C. App. 190, 336 S.E.2d 719 (1985); North Dakota, *State v. Fraser*, 2000 N.D. 53, 608 N.W.2d 244 (2000); Rhode Island, *State v. Malstrom*, 672 A.2d 448 (R.I. 1996); South Dakota, *State v. Picotte*, 416 N.W.2d 881 (S.C. 1987); Texas, *Robinson v. State*, 16 S.W.3d 808 (Tex. Crim. App. 2000); Vermont, *In re Moskaluk*, 156 Vt. 294, 591 A.2d 95 (1991); West Virginia, *State v. Bess*, 185 W. Va. 290, 406 S.E.2d 721 (1991); Federal Government, *Massaro v. United States*, 538 U.S. 500 (2003).

Cases, Judicial Conference of the United States, Committee Report (Sept. 27, 1989), *reprinted in* 45 Crim. L. Rep. 3239, 3240 (1989). As noted by Justice Kennedy, concurring in *Murray v. Giarrratano*, 492 U.S. 1, 14-15 (1989), “the complexity of our jurisprudence in this area . . . 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.”

It is hard to imagine any current issue the resolution of which could have a broader or more salutary effect on all aspects of death sentence case litigation than that presented in this case.

III IF A RIGHT TO EFFECTIVE POST CONVICTION COUNSEL IS RECOGNIZED THE DETERMINATION OF EFFECTIVENESS OF TRIAL AND APPEAL COUNSEL WOULD BE MADE MUCH SOONER, AND INTERESTS OF FEDERALISM WOULD BE BETTER SERVED BECAUSE STATE COURTS WOULD MAKE THE DETERMINATION MORE OFTEN.

A significant, longstanding and appropriate concern of Congress and this Court is that the States should entertain and decide prisoners’ claims of the infringement of federal rights, and that the federal courts should only intervene if the states have not reasonably performed that function. Antiterrorism and Effective Death Penalty Act, Pub. L. No 104-132, 110 Stat. 1214 (1996); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Review by this Court is appropriate where the state court decision seems “to present important questions touching the accommodation of state and federal interests under the Constitution.” Gressman *et. al.* SUPREME COURT PRACTICE §4.25 p. 298 (Ninth Ed. 2007), citing *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). This case would help harmonize state and federal

interests, and thus is appropriate for review.

The State may argue that the right which Petitioner urges this Court to recognize would retard the federalism principles 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 shortsighted 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 fewer claims properly exhausted in state courts. Reversal rates for capital cases are high. “The most comprehensive available data shows that 68% of death sentences did not survive post conviction 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.”¹²⁰ Thus confidence in the integrity of the capital prosecution system now 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 uphold federal claims, obviating the need for federal court involvement. Such a holding by this Court would require the states to provide competent counsel in post conviction cases, thus gaining significantly more control

¹²⁰ 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)

over, and responsibility for, catching the errors of federal law in their own systems. Therefore, in the long term, adopting the rule Petitioner urges would more likely reduce the number of federal habeas corpus ineffectiveness claims than increase them. The potential would be for the reversal rate of 6% in state post conviction cases to become the 21%, and the 21% in federal habeas cases to become the 6%.

Nor would the impact of recognizing a right to effective counsel in these kinds of post conviction proceeding be limited to avoiding forfeiture of a claim by preclusion from federal habeas proceedings. Of course avoiding procedural default would be a salutary development, for a defendant ought not to be denied relief on a meritorious claim simply because his counsel was ineffective in a way which resulted in the denial of such a claim in state court, with consequent procedural default of a claim in federal habeas proceedings. Ultimately, a valid constitutional claim ought to be heard, particularly ineffectiveness claims which have burdened capital litigation so greatly.

There are serious adverse consequences from the denial of effective counsel at the post conviction stage, affecting the interests of all – the State of Arizona, the prosecution, the victim and the defendant. Ineffectiveness claims ought to be competently litigated at the earliest moment. If they were, everyone's interests would be better served. The evidence would be less likely to be stale or lost, and the recollections of witnesses would be fresher. A claim lacking merit would be disposed of promptly and with confidence in the result. Or the constitutional harm to a defendant would immediately be redressed and the underlying problem

promptly resolved. Either way, any such problem would be resolved using the best available evidence. Any retrial or re-sentencing would occur sooner, and thus also be more reliable.

To validly resolve ineffectiveness claims in adversarial post conviction proceedings intrinsically requires that defendants have competent counsel. To hold otherwise renders a capital defendant's right to counsel for guilt, penalty and appeal stages illusory, and creates a legal fiction that post conviction proceedings are meaningful, even when they are not, as they were not here.

Moreover, the current rule that no right to effective counsel exists for post conviction actions is detrimental to the parties, victim, and state in other ways.

The federal habeas corpus overlay upon state capital prosecutions often greatly adds to the time between conviction and ultimate finality of a capital case, with obvious impact on victims, costs for the prosecutorial and penal systems, and loss of respect for the administration of capital punishment. *E.g. Wood v. Allen*, 130 S.Ct. 841 (2010)(crimes committed in 1993); *Porter v. McCollum*, 130 S.Ct. 447 (2009)(sentenced in 1988); *Smith v. Spisak*, 130 S.Ct. 676 (2010)(sentenced in 1982); *Wong v. Belmontes*, 130 S.Ct. 383 (2009)(sentenced in 1982). Meaningful post conviction proceedings would significantly reduce the instances of such delays. Moreover, a system which produces frequent federal court grants of habeas relief significantly intrudes upon the interests of federalism, under which Arizona presumptively assures defendants' rights under state and federal constitutions.

Finally, if, as occurred here, the ineffectiveness of post conviction counsel

causes a failure to exhaust federal claims in state courts, defendants like Petitioner are deprived of the safety net of federal habeas corpus to prevent “send[ing] men to their deaths without ensuring that their cases were not prejudiced by inadequate legal representation at any phase of the proceedings.” *Stanley v. Schriro*, 598 F.3d 612, 615 (9th Cir. 2010).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



Michael J. Meehan
333 North Wilmot
Suite 300
Tucson, AZ 85711
mmeehan@mungerchadwick.com
(520) 721-1900

March 28, 2011

Counsel of Record for Petitioner

APPENDIX A

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)	Arizona Supreme Court
)	No. CR-11-0058-PC
Respondent/Plaintiff,)	
)	Mohave County
v.)	Superior Court
)	No. CR-9358
DANIEL WAYNE COOK,)	
)	O R D E R
Petitioner/Defendant.)	
_____)	FILED 03/22/2011

Upon considering Daniel Wayne Cook's Petition for Review with Appendix, the State's Opposition, and the Reply,

IT IS ORDERED that the Petition for Review is denied.

DATED this _____ day of March, 2011.

FOR THE COURT:

Andrew D. Hurwitz,
Vice Chief Justice

TO:
Kent E. Cattani
John Pressley Todd
Michael J. Meehan
Daniel Wayne Cook, ADOC 69007, Arizona State Prison, Florence
- Eyman Complex-Browning Unit (SMU II)
Diane Alessi
Amy Sara Armstrong
Dale A. Baich
Hon. Steven F. Conn
Sherri Cullison
Virlynn Tinnell, Clerk

dh/jrr/

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

RECEIVED

IN AND FOR THE COUNTY OF MOHAVE

FEB 02 2011

HONORABLE STEVEN F. CONN

DIVISION 3

DATE: JAN. 27, 2011

SC*

VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,

Plaintiff,

vs.

No. CR-9358

DANIEL WAYNE COOK,

Defendant.

The Court has reviewed the Defendant's Third Petition for Post-Conviction Relief filed on November 23, 2010, the State's Response and the Defendant's Reply. The Court has reviewed the exhibits attached to the Defendant's Petition. The Defendant asserts that he is entitled to post-conviction relief because of newly discovered evidence which probably would have resulted in him not receiving the death penalty. The Defendant is not challenging his underlying conviction. That newly discovered evidence is his recent diagnosis with post-traumatic stress disorder which existed at the time of the crimes for which he was sentenced to death in this case. The Court assumes the validity of that diagnosis for purposes of this Order. The Defendant asserts that this evidence would have changed the sentence in 2 different respects. First, that the State would not have sought the death penalty. Second, that the Court would not have imposed the death penalty.

The State argues that the Defendant is precluded from the relief being sought and that the Petition should be summarily denied. Rule 32.1(e) provides that a defendant may seek post-conviction relief if newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Rule 32.2(a) provides that a defendant shall be precluded from

relief based upon any ground finally adjudicated on the merits on appeal or in any previous collateral proceeding or that has been waived at trial, on appeal or in any collateral proceeding. The grounds for preclusion are relevant because the Defendant in this case, following his jury trial and sentencing, has had a direct appeal and filed 2 previous petitions for post-conviction relief, in the latest of which he was represented by the same attorney representing him on the current proceeding. However, Rule 32.2(b) provides that Rule 32.2(a) does not apply to a claim for relief based on Rule 32.1(e), as is the claim in this case.

This does not mean that a claim for post-conviction relief based on newly discovered evidence can be made at any time without limitation. Rule 32.2(b) goes on to provide that when a claim of newly discovered evidence is to be raised in a successive or untimely post-conviction relief proceedings, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed. This case involves a petition, not a notice, which clearly sets forth the specific exception. The Court would still have the authority to summarily deny relief upon a determination that there are not meritorious reasons shown why the claim was not stated previously.

There are other procedural components to a claim of newly discovered evidence that invoke preclusion consideration. In order to show that newly discovered facts exist, a defendant must show that he exercised due diligence in securing the newly discovered facts. This means that there must be not only due diligence in discovering the facts that existed at, in this case, the time of sentencing but were unknown to the defendant but also due diligence in bringing them to the attention of the court. Unlike preclusion, which may require a simple review of the procedural history of the case, the issue of due diligence is more fact intensive. This case, of course, involves a claim of newly

discovered evidence that is being made more than 22 years after the relevant time in question, although the Court is aware of no bright line rule suggesting that there is some time frame beyond which one is presumed to no longer be acting with due diligence.

To justify relief under Rule 32.1(e) the facts must not be merely newly discovered but they must be material, meaning that they probably would have changed the sentence. The Defendant first asserts that his newly discovered diagnosis of post-traumatic stress disorder, if known to the State back in 1987, would have caused them to not seek the death penalty. This assertion is supported by an affidavit from the prosecutor in this case, Eric Larsen, indicating that he would not have sought the death penalty for the Defendant had he known the information contained in the exhibits attached to the most recent Petition.

The Court queries initially whether the exercise of prosecutorial discretion in deciding what charges to file and sentence to seek is a proper subject for inquiry under Rule 32.1(e). It seems that this form of relief is intended to address the discovery of facts relating to a case or a defendant's background which, if presented to the trier of fact or the sentencing entity, would have resulted in a different verdict or sentence. The Court acknowledges that it can identify no language in Rule 32.1(e) that would preclude this sort of claim, but it seems to the Court that this is not the scenario contemplated as a basis for relief under the rule. It strikes the Court as the ultimate in speculation to suggest that a defendant should get post-conviction relief for newly discovered evidence based on the assertion of a prosecutor 23 years after the fact that he would have made a different charging decision.

This is more apparent upon considering the specific circumstances involved in this case. The Court should preface its comments by noting that it had a great deal of respect for Mr. Larsen when he was a prosecutor for the Mohave County Attorney's Office and that that respect was not diminished in any way by him becoming a criminal defense attorney, although the Court can think

of only one case in which it has dealt with him in the latter capacity. That case was, ironically, also a Rule 32 case in which he testified as an expert witness for the defense in support of a claim of ineffective assistance of counsel.

The Court makes this observation not to suggest that Mr. Larsen is some hired gun whose services are available wherever a Rule 32 needs to be saved. To the extent that Mr. Larsen's opinion is relevant, the question is not what the Eric Larsen of today, having practiced criminal defense for at least the last 15 years, would do in a case involving identical facts if he were somehow to be appointed as a special prosecutor in a potential capital case. The question is what the prosecutor Eric Larsen would have done back in 1987 and 1988 without the benefit of the experience of criminal defense work, including defense of capital cases, to broaden his horizons and perspectives.

The Court would like to avoid getting into a discussion of personalities in this Order and recognizes that a determination of credibility based solely upon affidavits is improper, unless perhaps an affidavit is inherently incredible on its face. The Court recalls, however, that Mr. Larsen was an aggressive prosecutor and that there were times when he and the Court clashed as to how the Court handled this case. The Court also recalls an unrelated case prosecuted around this same time by Mr. Larsen in which a defendant claimed that his sentence should be mitigated by a diagnosis of post-traumatic stress disorder. The Court recalls that Mr. Larsen, who had served in the military, indicated that many military personnel, presumably including himself, did not necessarily believe in the viability of post-traumatic stress disorder as a psychiatric diagnosis and that it should not be treated as a relevant consideration in sentencing.

The Court acknowledges that it is skating on thin procedural ice by making these comments because it may seem to be deciding issues of credibility based on affidavits rather than sworn testimony subject to cross-examination. The Court is engaging in this analysis mainly to point out the problems inherent in trying to determine how a prosecutor would have exercised his discretion

23 years ago with the added knowledge of a diagnosis of post-traumatic stress disorder but without the added experience and perspective he undoubtedly gained in the ensuing years.

The Court is also aware that in 1987 and 1988, long before the Ring decision changed the landscape of capital sentencing, the Mohave County Attorney's Office sought the death penalty on a fairly regular basis. This was a case involving the torture, mutilation and eventually killing of 2 completely innocent victims who had the misfortune of working with and knowing the Defendant and the co-defendant in this case. It is unfathomable to the Court that the Mohave County Attorney's Office during the time that this case was pending would not have sought the death penalty even for a defendant who was known to have been diagnosed with post-traumatic stress disorder.

The Court finds that the affidavit from the former prosecutor of this case is speculation and conjecture. The Court determines that a claim that a different charging decision or sentencing request would have been made is not the difference in the verdict or sentence contemplated by Rule 32.1(e). The Court determines that the Defendant is not entitled to relief for newly discovered evidence based on the affidavit of Mr. Larsen.

The second basis for relief is that the Defendant would not have received the death penalty if his diagnosis with post-traumatic stress disorder had been known at the time of sentencing. Again, it has to be emphasized that the issue is what would have happened in 1988. The question is not what a post-Ring jury would do today at a significantly different procedure where the Defendant was presented by an attorney at a 3-part trial where all significant decisions would be made by the jury. The question is not even what this Court, whose thoughts about the application and efficacy of the death penalty have evolved considerably over the years, would do today if granted a Ring exemption and allowed to make a decision whether the Defendant should be sentenced to death. The question is whether this Court in 1988 would have made any different decision under the judicial sentencing

scheme in effect at the time had it known of the diagnosis of post-traumatic stress disorder in addition to everything else that it knew regarding the Defendant's mental health history.

This is not a case where the Court has to speculate about whether new evidence might have caused a jury to reach a not guilty verdict had they known of such evidence. This is not a case where the Court has to speculate about whether new evidence might have caused a jury to not recommend a death sentence had they known of such evidence. Only the Court knows for sure what it would have done, and the only speculation involved is in the process of remembering the judicial officer that it was 22 years ago.

The Court certainly recognizes the problems inherent in this analysis. Counsel may have a legitimate concern that the Court can say whatever it wants in an Order, without testifying under oath, being cross-examined or subjected to impeachment. The fact remains that this Court has had to make similar decisions in countless Rule 32 proceedings in which claims were made that different circumstances, usually involving more effective representation, would have resulted in different sentences being imposed. The fact that this is a death penalty case does not change the process, it just heightens the significance of the process. The Court determines unequivocally that if it had known in 1988 that the Defendant had been diagnosed with post-traumatic stress disorder at the time of the murders it still would have imposed the death penalty.

The State feels compelled to discuss the Bilke decision cited by both counsel, because it may suggest that an evidentiary hearing would have to be set under these circumstances. The Court does not believe that Bilke stands for the proposition that every post-sentencing diagnosis of post-traumatic stress disorder requires an evidentiary hearing or resentencing. As pointed out in Bilke, post-traumatic stress disorder was not even a recognized mental condition at the time the defendant in that case was sentenced. The diagnosis was not only new to that defendant but it was new to the medical profession. The diagnosis was an accepted one by the time of the sentencing in this case

and the cases cited in Bilke had been reported prior to the sentencing of the Defendant. The defendant in Bilke raised this issue in what may have been his first request for post-conviction relief 13 years after being sentenced rather than in his third such request 22 years after being sentenced, although that fact is probably of little relevance. More critical to the Court's consideration is that it cannot be ascertained from the Bilke decision whether the trial judge engaged in any analysis similar to what the Court is attempting to do in this Order. The decision lays out in specific detail the documentation that was presented to the trial court but indicates only that the trial court "denied the PCR without an evidentiary hearing." It is unknown to this Court, and cannot be determined from the appellate opinion, whether the Rule 32 judge was the same as the trial judge and, if so, whether his denial of post-conviction relief was done summarily without further discussion or whether it was based on the same judge in both phases of the proceedings having decided that the recent diagnosis would not have changed the decision that he had made years earlier. The Court determines that the Bilke decision does not by itself mandate a Rule 32 evidentiary hearing in this case.

The Court concludes for all the above reasons that the subsequent diagnosis of post-traumatic stress disorder simply gave a name to significant mental health issues that were already known to the Court at the time of sentencing. Knowing that name and knowing the symptomology of that condition would not have changed the sentencing decision made by the Court. The recent diagnosis is not material under Rule 32.1(e) because it would not have probably resulted in a different sentence being imposed by this Court.

Despite the determination that the diagnosis of post-traumatic stress disorder is not a material fact that has been newly discovered, the Court still addresses the issue of due diligence. Doing so is not meant to undermine that finding but to make as full a record as possible on the basis for the Court's ultimate ruling. Although a claim of newly discovered evidence is not subject to preclusion in the strictest sense, Rule 32.1(e)(2) requires due diligence and Rule 32.2(b) requires an explanation

for not raising a claim in a previous petition. In assessing due diligence the Defendant is held accountable for decisions made on his behalf by previous attorneys representing him and made by himself while representing himself.

The procedural history of the phases of this case at which the Defendant's mental health was discussed and assessed have been noted in the pleadings, can be determined from the record and will not be reiterated at this time. The concern the Court has with regard to the issue of due diligence is that the Defendant has had 2 previous Rule 32 proceedings in which this issue could have been raised. Certainly the first proceeding, initiated within a relatively short time after the trial proceedings and direct appeal, would have been the logical time to address this issue. Although the Defendant had obviously not yet then been diagnosed with post-traumatic stress disorder, that proceeding would have at least provided an avenue for requesting a further mental health examination of the Defendant, a request which could have been made by an attorney better able than the Defendant was during the trial proceedings to articulate the reasons for such an examination. The Court is aware that the Defendant has relatively recently suggested that he was denied effective assistance of counsel in that first Rule 32 proceeding, a claim which he did not formally make in the state proceedings for more than 10 years, but the Court has determined in ruling on his second petition that such a claim would not be one he could raise.

To a lesser extent the Court is also concerned that this issue was not developed in the second Rule 32 proceeding in which the Defendant was represented by the same attorney who represents him now. The Court concedes that this is a far less compelling argument as it relates to the issue of due diligence. The issue of the Defendant's mental health was raised in the second Rule 32 proceeding, so perhaps an attempt could have been made at that time to obtain further information regarding his mental health. The Court concedes that this observation may seem disingenuous since it actually ruled that this claim, that the Court improperly allowed the Defendant to represent himself

at trial and sentencing while he was mentally ill, was precluded. It is unlikely that the Court would have granted funds for an examination of the Defendant under those circumstances even if it had been requested.

The Court's main concern is that the diagnosis of post-traumatic stress disorder has been raised for the first time 23 years after the crimes for which he was sentenced and on the eve of the Arizona Supreme Court being asked to issue an execution warrant. Although the Court finds that the Defendant's present counsel has shown due diligence in raising this issue once the diagnosis was made, the Court determines that the Defendant and his attorneys at various stages of the proceedings in this case have not shown due diligence in securing that diagnosis. Even if the Court were to find that the Defendant's diagnosis of post-traumatic stress disorder were a material fact which probably would have changed the sentence imposed, which it has not, the Court would find that the Defendant did not exercise due diligence in securing that information and would not be entitled to relief on a claim of newly discovered evidence.

The Court's focus in this Order thusfar has been the claim of newly discovered evidence. This is consistent with the pleadings that have been filed. Although little attention is devoted to any other issue, the Defendant has also claimed that he is entitled to relief under Rule 32.1(h). This would require the Defendant to show by clear and convincing evidence that the recent diagnosis of post-traumatic stress disorder would be sufficient to establish that the court would not have imposed the death penalty. Although under the circumstances of this case it is hard to separate this claim from the claim of newly discovered evidence, the claim of "actual innocence" is different in that it lacks the component of due diligence. However, the Court's determination that it still would have imposed the death penalty had it known that the Defendant had post-traumatic stress disorder in effect constitutes a ruling on the claim under Rule 32.1(h).

IT IS ORDERED denying the Defendant's Third Petition for Post-Conviction Relief.

cc:

Mohave County Attorney*

Michael J. Meehan
333 N. Wilmot, Suite 300
Tucson, AZ 85711
Attorney for Defendant

Arizona Supreme Court
1501 W. Washington, Suite 402
Phoenix, AZ 85007-3329

Arizona Attorney General
Criminal Division
1275 W. Washington
Phoenix, AZ 85007

Honorable Steven F. Conn*
Division 3

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

RECEIVED

IN AND FOR THE COUNTY OF MOHAVE

FEB 22 2011

HONORABLE STEVEN F. CONN

DIVISION 3

DATE: FEB. 16, 2011

SC*

VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,

Plaintiff,

vs.

No. CR-9358

DANIEL WAYNE COOK,

Defendant.

Counsel for the Defendant has filed a Motion for Reconsideration. Although not labeled as such, the Court treats the pleading as a Motion for Rehearing pursuant to Rule 32.9(a). The Court has reviewed the file, including the Defendant's Notice of Post-Conviction Relief and Third Petition for Post-Conviction Relief filed on November 23, 2010, and the Court's Order dated January 27, 2011. Any impression one might have received from the Order that the Court had not seen the Notice and the attachments thereto is mistaken. The Court read the Notice, the Petition, and all the exhibits and attachments before entering the Order.

IT IS ORDERED denying the Defendant's Motion for Reconsideration.

...

...

cc:

Mohave County Attorney*

Michael J. Meehan
333 N. Wilmot, Suite 300
Tucson, AZ 85711
Attorney for Defendant

Arizona Supreme Court
1501 W. Washington, Suite 402
Phoenix, AZ 85007-3329

Arizona Attorney General
Criminal Division
1275 W. Washington
Phoenix, AZ 85007

Kip Anderson*
Mohave County Court Administrator

Honorable Steven F. Conn*
Division 3

APPENDIX D

the management company, could be directly liable for bad faith breach of contract. *Williams*, 781 P.2d at 158. Cf. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo.1985) (employer's workmen's compensation insurer must deal in good faith with injured employee and employee may sue for insurer's failure to so deal despite lack of direct contractual relationship); *Johnson v. Scott Wetzel Services, Inc.*, 797 P.2d 786 (Colo. App.1990) (independent adjusting firm may be held liable to injured worker for bad faith processing of a workmen's compensation claim regardless of lack of contractual privity).

At the very least, the record indicates that GRW is the management company of GRC. As in *Trimble* and *Williams*, GRW hired the claims adjusters and managed the claims office that processed plaintiffs' insurance claims. Moreover, GRW determined Kristin's eligibility, benefits and premium for the conversion coverage that ostensibly originated in the GRC policy.¹ The service agreement identifies GRW as responsible for GRC's policyowner's service, claims processing and other administrative services. Likewise, a letter from GRW's agent, O'Hanlon, suggests GRW had the ability to cancel GRC's Allcare insurance plan.

We believe plaintiffs alleged facts sufficient to withstand GRW's motion for summary judgment on a direct liability/management theory.

V. DISPOSITION

The memorandum decision of the court of appeals is vacated. The decision of the trial court is reversed and remanded for proceedings consistent with this opinion.

GORDON, C.J., and FELDMAN, V.C.J., and MOELLER, J., concur.

CORCORAN, Justice, dissenting:

The plaintiffs insist upon suing the wrong corporation in the wrong state. Arizona is hosting litigation by California residents against a Washington corporation.

1. Although the conversion coverage is not at issue in this case, it is pertinent because it

The target of the litigation is actually a wholly-owned subsidiary of that corporation, which is incorporated and doing business in California. The venue of this litigation should be California where the plaintiffs reside and where the California corporation issued the policy.



821 P.2d 731

STATE of Arizona, Appellee,

v.

Daniel Wayne COOK, Appellant.

No. CR-88-0301-AP.

Supreme Court of Arizona,
En Banc.

Dec. 5, 1991.

Reconsideration Denied Jan. 21, 1992.

Defendant was convicted in the Superior Court, Mohave County, No. CR-9358, Steven F. Conn, J., of two counts of first-degree murder and sentenced to death. Defendant appealed. The Supreme Court, Feldman, V.C.J., held that: (1) the evidence showed that the defendant was competent to waive counsel and that he voluntarily did so and chose to represent himself; (2) defendant waived his claim that the trial court erroneously prevented him from introducing evidence of intoxication that might have been relevant to his culpable mental state where the defendant did not object to the granting of the State's motion to proceed on a theory that the defendant acted "knowingly," rather than "intentionally"; (3) comments made by the prosecutor during closing argument did not refer to the defendant's failure to testify or his invocation of his right to remain silent; (4) the trial court did not abuse its discretion in excusing a juror for cause after learning that the juror had discussed the case with her co-workers in violation of the trial

evinces the intertwining relationship between GRW and GRC.

no mitigating circumstances that could have outweighed aggravating circumstance. A.R.S. § 13-703, subd. G, par. 1.

33. Criminal Law ⇐983

Disparity between defendant's death sentence and codefendant's 20-year sentence pursuant to plea bargain was not so great as to outweigh aggravating circumstances that murders were cruel, heinous, or depraved, that one murder had been committed for pecuniary gain, and that each murder had been committed in course of committing the other; defendant had never requested that trial court consider disparity as matter in mitigation, and record indicated that trial court considered circumstances surrounding equally culpable codefendant.

34. Homicide ⇐357(7, 9, 11)

Aggravating circumstances that murders were heinous, cruel, or depraved, that one murder had been committed in anticipation of pecuniary gain, and that each murder had been committed in course of committing the other outweighed any possible statutory mitigating circumstances and, therefore, death sentences were proper. A.R.S. § 13-703, subds. F, pars. 5, 6, 8, G, par. 1.

35. Homicide ⇐356

Death penalty imposed upon defendant, after he was convicted of two murders that were committed after victims had been sodomized and tortured, was neither excessive nor disproportionate to penalty imposed upon defendants in other cases. U.S.C.A. Const.Amend. 8.

Grant Woods, Atty. Gen. by Gerald R. Grant, Phoenix, for appellee.

George M. Sterling, Jr., Phoenix, for appellant.

OPINION

FELDMAN, Vice Chief Justice.

Defendant Daniel Wayne Cook was convicted of two counts of first degree murder and sentenced to death on both counts. We have jurisdiction over this automatic

appeal pursuant to article 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4033.

FACTS AND PROCEDURAL HISTORY

Shortly after 4:00 a.m. on July 21, 1987, John Matzke and Byron Watkins arrived at the Lake Havasu City Police Department, where Matzke reported his involvement in two murders committed at his apartment during the evening of July 19 and early morning of July 20. Matzke told officers about the crimes and granted the police consent to enter the apartment. Investigating officers went to the apartment that Matzke shared with Cook. After arresting Cook, officers searched the apartment and discovered the bodies of Carlos Cruz Ramos and Kevin Swaney in the closet of Matzke's bedroom. Autopsies revealed that both victims had been strangled.

Cook and Matzke were each indicted on two counts of first degree murder. In return for the state's dismissal of all other charges, Matzke agreed to plead guilty to one count of second degree murder and to testify against Cook. Cook was not offered a plea agreement. At trial Matzke related the following sordid story of bondage, torture, and sodomy, in which Cook was the principal protagonist.

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

Over the course of the next six or seven hours, Cruz Ramos was cut with a knife, beaten with fists, a metal pipe and a wooden stick, burned with cigarettes, sodomized, and had a staple driven through his

foreskin. Matzke suggested that they kill Cruz Ramos because they could not let him go. Cook replied that Cruz Ramos should be killed at midnight, "the witching hour." When midnight arrived, Matzke first tried to strangle Cruz Ramos with a sheet. Matzke then took Cruz Ramos out of the chair, put him on the floor, and pushed down on his throat with a metal pipe. According to Matzke, because Cruz Ramos still would not die, Cook pressed down on one end of the pipe while Matzke pressed on the other. Finally, Matzke stood on the pipe as it lay across Cruz Ramos' throat and killed him.

Matzke and Cook later dressed Cruz Ramos and put him in the closet of Matzke's bedroom. The autopsy revealed that Cruz Ramos had suffered severe lacerations and contusions as a result of his beating, that he had been cut on the chest, and that his stomach and genitals had been burned. The autopsy also revealed that Cruz Ramos had two puncture holes in his foreskin and that his anus was dilated, although no semen was detected.

Kevin Swaney was a sixteen-year-old runaway and sometime guest at the apartment. He was a dishwasher at the restaurant where the others worked. Shortly after 2:00 a.m., approximately two hours after Cruz Ramos' death, Swaney stopped by the apartment. Cook initially told Swaney to leave, but subsequently invited him inside. Cook and Matzke told Swaney they had a dead body upstairs and, according to Matzke, Cook took Swaney upstairs and showed him Cruz Ramos' body. Swaney was crying when he and Cook returned downstairs. Cook reportedly told Swaney to undress, and Swaney complied, and Cook and Matzke then gagged him and tied him to a chair in the kitchen. Matzke said he told Cook that he would not witness or participate in Swaney's torture. Matzke then went into the living room and fell asleep in a chair.

Cook later woke Matzke, who said he saw Swaney bound and gagged, sitting on the couch, crying. Cook told Matzke he had sodomized Swaney and that they had to kill him. Matzke said they tried to

strangle Swaney with a sheet, but Matzke's end kept slipping out of his hands. Cook then reportedly stated "this one's mine," placed Swaney on the floor, and strangled him. He carried Swaney's body upstairs and put him in the closet with Cruz Ramos.

The autopsy revealed that Swaney's anus was dilated and semen was present, although the identity of the donor could not be ascertained. Matzke's fingerprints were found on the knife used to cut Cruz Ramos' chest, but no identifiable fingerprints were found on the metal pipe or wooden stick. Cook's fingerprints were found on the chair to which Cruz Ramos had been tied, the closet door, and the stapler. His semen was found on the strips that had been torn from his bed-sheets. There was no other physical evidence of Cook's participation.

After Swaney's murder, Cook and Matzke fell asleep downstairs. Later in the day, Matzke went to work, but returned a few hours later after quitting his job at the restaurant. Late that evening, some friends came over to the apartment. Early in the morning of July 21, 1987, Matzke took one of the friends, Byron Watkins, outside of the apartment and told him about the murders. Watkins convinced Matzke to go to the police.

When Cook was arrested and brought to the station, he was questioned by Detective David Eaton of the Lake Havasu City Police Department. According to Eaton, he advised Cook of his *Miranda* rights, then asked him how the two bodies found in the apartment had gotten there. Cook replied that "we got to partying; things got out of hand; now two people are dead." When asked how they died, Cook said "my roommate killed one and I killed the other."

Cook was initially represented by appointed counsel. Prior to trial, Cook decided to waive his right to counsel and to represent himself. The trial judge strongly advised Cook against representing himself, enumerating the pitfalls he was likely to encounter. The trial court then accepted his waiver of counsel as knowingly, intelligently, and voluntarily given, and appointed Cook's former counsel to be his advisory

counsel. Also before trial, the trial court granted the state's motion to preclude all evidence of intoxication, and allowed the state to proceed on the theory that the murders were committed "knowingly." That is, the state would not have to prove that Cook acted intentionally in the murders of Cruz Ramos and Swaney, and therefore evidence of intoxication, which might negate intent but not knowledge, was precluded. See A.R.S. § 13-503.

The jury convicted Cook on both counts of first degree murder. At the sentencing hearing, Cook stated that the only penalty he would accept was death, and presented no mitigating evidence, though he did mention his lack of any other felony convictions. The state argued that the murder of Cruz Ramos was committed for pecuniary gain under A.R.S. § 13-703(F)(5), and that it was committed in an especially cruel, heinous, and depraved manner under A.R.S. § 13-703(F)(6). The state also argued that Swaney's murder was especially cruel, heinous, and depraved. The court found these aggravating factors to exist and, *sua sponte*, found an additional aggravating factor in both murders—that they were committed during the commission of another homicide under A.R.S. § 13-703(F)(8). The trial court found no mitigating factors, and sentenced Cook to death on each count, with the proviso that if the sentences were reduced to life on appeal, they would run consecutively.

The clerk of the Mohave County Superior Court filed a timely notice of appeal on Cook's behalf. See Rule 31.2(b), Ariz. R.Crim.P., 17 A.R.S. (hereinafter Rule —). Cook claims the following errors on appeal:

1. He was denied his sixth amendment right to counsel when: (a) the trial court permitted him to waive his appointed counsel and proceed in *propria persona*, and (b) he was not permitted hybrid representation.

2. The trial court allowed the prosecution to convict Cook of first degree murder on the culpable mental state of "knowingly" rather than "intentionally," thus precluding evidence of voluntary intoxication.

3. The prosecutor impermissibly commented on Cook's invocation of his fifth amendment right not to testify.

4. The trial court dismissed a juror after evidence had been presented in the case, based on allegations stemming from the prosecutor's personal investigation of her out-of-court conduct.

5. The trial court denied Cook a fair trial by refusing to continue the trial to allow Cook to secure the testimony of certain witnesses.

6. The admission at trial of a statement made by Cook at his initial appearance violated his right to counsel.

7. Matzke was permitted to testify at trial under a plea agreement requiring him to testify consistently with prior testimony and statements to police.

8. The trial court refused to instruct the jury on second degree murder.

9. The trial court erred in finding as an aggravating circumstance that each homicide was committed during the commission of the other.

10. The trial court erred in finding as an aggravating circumstance that the murder of Carlos Cruz Ramos was committed in an especially "cruel, heinous and depraved" manner.

11. The trial court erred in finding as an aggravating circumstance that the murder of Carlos Cruz Ramos was committed in anticipation of pecuniary gain.

12. The trial court erred in finding as an aggravating circumstance that the murder of Kevin Swaney was committed in an especially "cruel, heinous and depraved" manner.

13. The trial court's pretrial order precluding evidence of voluntary intoxication denied Cook evidence of a mitigating circumstance.

14. The trial court erred in not considering Cook's history of neurological, mental, and psychiatric problems in its determination of mitigating factors.

15. The trial court erred in not considering as a mitigating factor the disparity between the sentence that Matzke received

under his plea agreement and Cook's possible death sentence.

16. Cook also argued that the Arizona death penalty statutes are unconstitutional on two grounds. First, the § 13-703(F)(6) aggravating factor of especially cruel, heinous, or depraved is unconstitutionally vague. Second, the statutory provisions governing the sentencing procedures in death penalty cases create an unconstitutional presumption or mandate of the death penalty.

In a recent decision upholding the constitutionality of Arizona's death penalty statute, the United States Supreme Court specifically rejected these two arguments. *Walton v. Arizona*, 497 U.S. 639, —, 110 S.Ct. 3047, 3056-58, 111 L.Ed.2d 511 (1990). We, too, having recently considered these last arguments and discussed the application of *Walton*, conclude that Cook's contentions are without merit. *State v. Amaya-Ruiz*, 166 Ariz. 152, 175-77, 800 P.2d 1260, 1283-85 (1990), *cert. denied*, — U.S. —, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991). Accordingly, we limit our discussion to claims of error one through fifteen.

DISCUSSION

I. Guilt/Innocence Issues

A. Self-Representation/Denial of Hybrid Representation

Cook claims that he was unconstitutionally permitted to waive counsel and to represent himself. The United States Supreme Court has held that a defendant has a constitutional right to waive his right to counsel and to proceed in *propria persona* as long as he is competent to waive the right and knowingly and voluntarily exercises the right. *Faretta v. California*, 422 U.S. 806, 834-36, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

[1] When Cook moved to waive his defense counsel and proceed in *propria per-*

sona, the trial court cautioned him at length about the hazards of self-representation and described the problems Cook was likely to encounter. *See Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 (defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)). The trial court then carefully determined that Cook was competent to waive his counsel and that Cook's decision to do so was voluntary. On this record, we find no error. While Cook certainly lacked a lawyer's skills, the record demonstrates that he was intellectually competent, understood the trial process, and was capable of making—and did make—rational decisions in managing his case. This is all the competence that is required. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541 ("a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation.... The record affirmatively shows that [defendant] was literate, competent, and understanding, and that he was voluntarily exercising his informed free will").

[2] Cook also claims that the trial court erred in denying him hybrid representation.¹ We disagree. Arizona does not recognize a right to hybrid representation. *State v. Rickman*, 148 Ariz. 499, 504, 715 P.2d 752, 757 (1986).

[3] We also reject Cook's arguments that the judge unduly limited the participation of his advisory counsel, denied him lay assistance, and denied him in-court assistance from his court-appointed investigator. Before accepting Cook's motion to proceed in *propria persona*, the trial judge informed Cook that he would be appointed advisory counsel and explained to Cook what the role of advisory counsel encom-

1. Hybrid representation is the representation of a defendant both by himself and by counsel. Such representation is distinguished from advisory counsel, who gives a *pro per* defendant technical assistance in the courtroom but does

not participate in the actual conduct of the trial. *State v. Rickman*, 148 Ariz. 499, 504 n. 1, 715 P.2d 752, 757 n. 1 (1986). Cook was provided with advisory counsel.

passed. The judge reiterated this explanation in Cook's presence during jury selection. During the trial itself, when the judge expressed concern that Cook's advisory counsel may have been offering unsolicited advice—and so potentially infringing on Cook's right to self-representation—Cook explained to the judge that such advice was consistent with what Cook and advisory counsel had mutually arranged.

[4] The judge was also correct in denying Cook's motion to have fellow prisoner Terry Holt, a "jailhouse lawyer," sit with Cook at the defense table as an "investigator." The judge determined that Cook wanted Holt to act as advisory counsel, and ruled that Cook already had advisory counsel and that in any case Holt was without authority to render official legal assistance.

B. Conviction on "Knowing" First Degree Murder and Preclusion of Evidence of Defendant's Intoxication

The state's pre-trial motions informed Cook and the court that the state would proceed at trial to prove a culpable mental state of "knowing," and not "intentional," first degree murder. See A.R.S. § 13-1105(A)(1). The state simultaneously moved to preclude evidence of Cook's intoxication that might otherwise have been relevant to disprove the culpable mental state of intent. The trial court granted the motion and ruled that neither the state nor the defense would be permitted to present evidence at trial of Cook's intoxication.

Cook now argues that the trial court erred in allowing the state to convict him of first degree murder under a mental state of only "knowingly" and not "intentionally." He contends that the court's ruling wrongfully denied him the opportunity to pursue the defense of voluntary intoxication at trial. He claims that such evidence should have been permitted because the jury was instructed on accomplice liability with respect to the murder of Cruz Ramos, which requires a finding of specific intent. He argues further that he was wrongfully precluded from introducing evidence of intoxication as a mitigating circumstance at the sentencing phase.

[5] A person commits first degree murder if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation...." A.R.S. § 13-1105(A)(1). The language of the statute is clearly disjunctive, so a person may be guilty of first degree murder by causing the death of another with premeditation either intentionally or knowingly. *State v. Lavers*, 168 Ariz. 376, 389, 814 P.2d 333, 346, *cert. denied*, — U.S. —, 112 S.Ct. 343, 116 L.Ed.2d 282 (1991); see also *State v. Rankovich*, 159 Ariz. 116, 122, 765 P.2d 518, 524 (1988). Similarly, "[u]nder A.R.S. § 13-1101(1), a defendant premeditates his crime if he either *intends or knows* that his acts will kill another human being, and his *intention or knowledge* precedes the killing by a length of time to permit reflection." *Rankovich*, 159 Ariz. at 122, 765 P.2d at 524 (emphasis in original). In addition,

[a]lthough voluntary intoxication is not a defense to crime, our legislature permits juries to consider the fact that a defendant was intoxicated at the time of the criminal act, when determining the defendant's culpable mental state. However, the legislature allows such consideration only "when the actual existence of the culpable mental state of intentionally or with the intent to is a necessary element to constitute any particular species or degree of offense...." A.R.S. § 13-503.

* * * * *

If a defendant is charged with knowingly committing first degree murder, the jury is not permitted to consider the "mental state of intentionally." ... Because the "mental state of intentionally" was not in issue, [defendant] was not entitled to a voluntary intoxication instruction under A.R.S. § 13-503.

Id.; see also *Lavers*, 168 Ariz. at 389, 814 P.2d at 346; *State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984) ("even assuming [defendant] was intoxicated ... the jury could still properly convict him of first de-

gree murder if they believed he 'knowingly' caused the victim's death").

[6] Whatever the merits of Cook's argument regarding the effect of intoxication on the culpable mental state of "knowing," we must reject his claim in the present case. At the hearing on the state's motion to proceed on a theory of "knowingly" and to preclude evidence of defendant's intoxication, the trial judge asked Cook whether he had any objection to an order precluding evidence of intoxication. Cook replied that he had none because it "basically does not even apply to my defense." Reporter's Transcript (R.T.) June 24, 1988, at 16. The court suggested to Cook ways in which such evidence might be relevant and explained to him what the consequences of preclusion would be. Cook reiterated that he had no objection. Further, Cook did not request the trial court to instruct the jury on voluntary intoxication. Cook waived any claim of error on appeal by failing to request a jury instruction at trial. Rule 21.3(c); *State v. Whittle*, 156 Ariz. 405, 408, 752 P.2d 494, 497 (1988).

[7, 8] The trial judge instructed the jury on accomplice liability under A.R.S. § 13-301, which requires the state to prove that the defendant acted with the intent to promote or facilitate the commission of an offense. Cook failed to object to the judge's jury instruction on accomplice liability. Thus, absent fundamental error, any argument that the judge should not have instructed the jury on accomplice liability because the state chose to proceed on a theory that Cook acted only "knowingly," and so should be precluded from convicting Cook as an accomplice, is waived. *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) ("The failure to object to an instruction either before or at the time it is given waives any error, absent fundamental error."). Because there was sufficient evidence before the jury to support its finding that Cook acted with the requisite intent to promote or facilitate the murder of Cruz Ramos, we find no fundamental error.

Finally, the trial judge's order precluding evidence of intoxication at trial applied only to the trial, and in no way precluded Cook

from introducing evidence of intoxication to establish a mitigating factor at the sentencing hearing.

C. References at Trial to Cook's Fifth Amendment Rights

Cook claims that the prosecutor impermissibly drew the jury's attention to his invocation of his fifth amendment privilege not to testify in his defense. In support of his claim, he points to the following excerpts from the prosecutor's closing arguments:

Perhaps most importantly from what Mr. Holt has to say ... is he helps him as a legal adviser. He files motions on his behalf; wants to be his investigator at trial to help him out there. They have these long conversations. They talk everyday [sic]. Never once was Terry Holt told by this man where he was. Never once does Dan Cook ... say I wasn't there because I was at McDonalds in Kingman or out of state or somewhere. Why was [Holt] never told where Dan Cook was?

* * * * *

John Matzke doesn't have anything to hide. This man does.

How do we know that? Remember voir dire when we were selecting everybody? His left forearm has the tattoo of a dagger on it. He has covered that tattoo from the first day of the trial until today. He has had a large band-aid over that dagger. He covered that up. I suppose he didn't want you to think that he does have violent tendencies. If you saw that dagger on his forearm you could suppose that he did have such so he covered it up.

We wonder what else he covered up. But we don't have to wonder long. We don't have to wonder hard because he's done a poor job of covering everything else up.

* * * * *

There were only four people there at that [sic] time of the deaths; two of them are

dead; one is in prison; one is the Defendant.

R.T. July 6, 1988, at 78-79, 84.

[9] Cook did not object to these comments at trial. "Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error." *State v. Smith*, 138 Ariz. 79, 83, 673 P.2d 17, 21 (1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984). Consequently, Cook may be entitled to relief only if the prosecutor's comments rise to the level of fundamental error.

[10] We have previously explained that, in general,

it is constitutional error for the prosecution to comment on the defendant's decision not to testify in his own defense. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Arizona also has a statute precluding such comment. A.R.S. § 13-117(B) (formerly § 13-163(B)).

However, to be impermissible, the prosecutor's comments must be calculated to direct the jurors' attention to the defendant's exercise of his fifth amendment privilege.

State v. McCutcheon, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988). Such "statements must be examined in context to determine whether the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *Schrock*, 149 Ariz. at 438, 719 P.2d at 1054; see also *State v. Decello*, 113 Ariz. 255, 258, 550 P.2d 633, 636 (1976) (prosecutor's comment, "no one, no one, no one got up on this stand and testified to you contrary," held to be fundamental error); *State v. Rhodes*, 110 Ariz. 237, 238, 517 P.2d 507, 508 (1973) (prosecutor's comment, "that [defendant] did not have to explain away, or that [defendant] did not explain away off of that witness stand," held improper) (emphasis omitted).

Considered in the appropriate context, the prosecutor's comment regarding Cook's conversations with Terry Holt was not a comment on Cook's failure to testify or his

invocation of his right to remain silent. Cook had listed alibi as one of his defenses, and the prosecutor's statement implies that if Cook had an alibi, he would have mentioned it in his allegedly frequent conversations with Holt. See *Schrock*, 149 Ariz. at 439, 719 P.2d at 1055 (prosecutor's comment that defendant had no alibi did not create an impermissible inference, but "related only to the fact that the defendant in his statements to the officers did not support the alibi defense defendant had pled"). The prosecutor did not insinuate that Cook had failed to provide an alibi because he had not testified at trial. Cf. *State v. Cannon*, 118 Ariz. 273, 274, 576 P.2d 132, 133 (1978) (fundamental error for prosecutor to comment in argument that the one question the jury should focus on was where the defendant was, which "*was never answered by the defendant*") (emphasis in original). Because the prosecutor's comment was not directed at the fact that Cook did not testify, Cook was not denied a fair trial.

Nor did the prosecutor's comments regarding Cook's tattoo violate Cook's fifth amendment rights. The comments were part of a rhetorical argument suggesting that Cook had tried to cover up his participation in the murder. There is nothing to suggest that these comments referred to the fact that Cook did not testify or that they were calculated to draw the jury's attention to that fact. Cook's reliance on *State v. Ballantyne*, 128 Ariz. 68, 623 P.2d 857 (Ct.App.1981), is misplaced. In *Ballantyne*, the defendant's conviction was reversed because the prosecutor's references to a tattoo during cross-examination and rebuttal were irrelevant and highly prejudicial attempts to prove defendant's bad character and implied the existence of an unsubstantiated and prejudicial factual predicate. The defendant in *Ballantyne* testified at trial, so the court did not face the issue of improper references to the defendant's fifth amendment rights.

[11] The final comment to which Cook ascribes error arose as a consequence of Cook's attempt to discredit testimony regarding a statement he made to the police.

In cross-examining Detective Eaton, Cook attempted to cast doubt on his alleged inculpatory statement by asking why other witnesses' *Miranda* waivers and statements were recorded, but Cook's alleged inculpatory statement was not:

Q. Sir, is it true that everybody else that was interviewed by you was recorded in some way other than myself?

A. We recorded Mr. Matzke. At the conclusion of my interview with you, you requested not to be recorded because you didn't want to make a statement. We had the tape playing so we recorded Mr. Watkins.

Q. But you didn't record me; is that correct?

A. That's correct. You invoked your right to remain silent and I terminated the interview.

R.T. June 30, 1988, at 120.

Cook immediately objected. After completing his cross-examination, Cook requested that the court declare a mistrial because Eaton had referred to Cook's invocation of his right to remain silent. The court denied the request, stating that the testimony was in response to the line of questioning that Cook had been pursuing for over twenty minutes.

Later, during the prosecutor's rebuttal argument, the prosecutor made reference to Eaton's testimony:

And what about the videotape. John Matzke made one and we heard continuous cross-examination of the detective about why the Defendant didn't make one. He didn't make one because he, the Defendant, was the one that cut off the interview. If he had made one, you would have had the statements we got to partying a little bit and things got out of hand. My roommate killed one and I killed the other. I killed Kevin. You would have heard the exact same statements.

R.T. July 6, 1988, at 84. Cook objected to this comment and, after the arguments were concluded, again moved for a mistrial. The court denied his motion for the same reason it had denied his previous request for a mistrial. The court explained that

once the testimony came in, the prosecutor was justified in referring to it in his argument.

We agree with the trial court that any error occasioned by Detective Eaton and the prosecutor's comments was invited by Cook's strategy in questioning why his interview had not been taped. In *State v. Arredondo*, 111 Ariz. 141, 144, 526 P.2d 163, 166 (1974), we held that remarks by the prosecutor that normally would have been fundamental error were "invited and occasioned by the statements of defense counsel; hence they are not grounds for reversal." Here, after demonstrating self-restraint that the trial court found remarkable given Cook's questions, Detective Eaton finally explained that Cook did not make a taped statement because Cook himself terminated the interview. Later, to counter Cook's strategy of insinuating that his statement had been coerced or fabricated because it had not been videotaped, the prosecutor explained in his rebuttal argument why no videotape had been made. The prosecutor's point was simply that the fact that Cook's admission had not been videotaped ought not dampen its inculpatory impact.

We hold, therefore, that neither Detective Eaton nor the prosecutor violated Cook's fifth amendment rights because their responses were reasonable and pertinent given Cook's entire line of questioning. See *State v. Christensen*, 129 Ariz. 32, 39, 628 P.2d 580, 587 (1981) ("the remark of the prosecution did not go beyond a pertinent reply and was not reversible error").

D. Dismissal of Juror

After the state had begun to present its evidence, the court granted a motion by the prosecutor to excuse a juror for cause. In making his motion, the prosecutor informed the court that a juror had attempted to speak with him and

has spoken at length in detail with her co-workers concerning the goings on at the trial which she has witnessed. She has also made representatives [sic] as to her opinion as to the guilt or innocence of

Mr. Cook.... Based on that, I believe we have a problem with [the juror]. She is incapable of following your admonitions.

R.T. July 5, 1988, at 7.²

The trial judge then interviewed the juror on the record with Cook and the prosecutor present. When asked if there was something she had wanted to communicate to the prosecutor, she explained that she had approached him and "asked him if it was proper for me to speak with him. He said no so then I was going to wait and see and speak with you a little later." She said that a few days earlier, on July 1 (while the court was in recess), the prosecutor had called her office and spoken to her co-workers. She admitted that there had been comments made about the trial between her and co-workers, but denied talking about the trial testimony. She said that she had told her co-workers that she "didn't think it was a well-organized trial and ... some of the witnesses looked—well, made themselves look as if [they] didn't know what they were talking about." She also said that her "co-workers would say did you hang him yet and I would say no...." She told the trial judge that "if you feel that I should be disqualified because of that, I'm willing to be disqualified because I don't care for my co-workers to be harassed on the job [by the prosecutor]." She also told him that she had formed no opinion as to Cook's guilt or innocence, and denied having said anything to her co-workers that could have been taken to mean that she had.

When questioned by the prosecutor, she admitted having been asked by co-workers whether the photographs and videotape

shown at trial had made her sick and having responded that they had not. She also admitted having said that the victims looked in the photographs like they were asleep, but denied having gone into any detail.

Cook argued at trial that the juror should not be dismissed because the only basis for excusing her was the prosecutor's own statements, and the juror had denied the prosecutor's allegations. The judge nevertheless excused her from the jury, finding that "even though at least as far as her description of it, it perhaps sounds innocuous," it was clear that she had disobeyed his admonitions. Fourteen jurors had originally been seated to hear the trial, and one had already been excused, so when the challenged juror was excused the trial proceeded with the remaining twelve jurors.

Cook claims on appeal that the dismissal of the juror denied him the "right to a fair trial by jury." Cook did not move for a mistrial, nor did he claim error on this ground in his motion for a new trial.³

[12] Under the Arizona Rules of Criminal Procedure,

[w]hen there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse him from service in the case. A challenge for cause may be made at any time....

Rule 18.4(b).⁴ Challenges for cause are permitted even after the jury has begun to hear evidence. *State v. Evans*, 125 Ariz. 140, 142, 608 P.2d 77, 79 (Ct.App.1980).

2. The judge later asked the prosecutor "out of curiosity" how the matter had come to his attention. The prosecutor explained that the wife of one of the juror's co-workers at the Bureau of Land Management worked for Mohave County; she informed a deputy county attorney, who in turn relayed the information to him.

3. One of Cook's grounds for a new trial was that the "prosecution is guilty of misconduct, by mingling with the jurors." At a hearing on Cook's motion, the trial court ruled that there was no evidence before him that the prosecutor had mingled with the jurors.

170 Ariz. Rep.—5

4. An earlier version of this rule, contained in the 1956 Arizona Rules of Criminal Procedure, contained a catalogue of fifteen grounds for dismissing a juror for cause. As the official comments to the current Rule 18.4(b) explain,

[t]he omission of the list is intended to direct the attention of attorneys and judges to the essential question—whether a juror can try a case fairly. A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties.

[13] Determining whether there are reasonable grounds to believe that a juror cannot render a fair and impartial verdict is within the discretion of the trial judge. Only the trial judge has the opportunity to observe the juror's demeanor and the tenor of his or her answers first hand. Consequently, we will not disturb the decision of the trial court on appeal unless there is a clear showing that the court abused its discretion. *State v. Chaney*, 141 Ariz. 295, 303, 686 P.2d 1265, 1273 (1984).

We find no abuse of discretion. While the circumstances through which this matter was brought to the court's attention were irregular, it was reasonable for the trial judge to determine that the juror's ability to render a fair and impartial verdict had become suspect. She admitted to the judge that she had commented on the trial with her co-workers despite the judge's clear admonitions not to discuss the case with outsiders. We recognize that some discussion by jurors of their pending cases may be inevitable. See *Bruce v. Duckworth*, 659 F.2d 776, 781 (7th Cir.1981) ("It is unrealistic and impossible to expect or require that a jury be a laboratory completely sterilized and freed from all external factors."), *cert. denied*, 455 U.S. 955, 102 S.Ct. 1464, 71 L.Ed.2d 673 (1982). Nevertheless, the trial court had evidence of specific violations of its admonitions to the jurors. These violations went beyond casual utterances regarding, for example, the length of the trial or similar matters, but instead concerned the conduct of witnesses and the content of specific exhibits. The court did not abuse its discretion in determining that there was cause to strike the juror for violation of its admonition. See *Buchanan v. State*, 263 Ind. 360, 332 N.E.2d 213, 218 (1975) (juror who admitted violating court's admonition about discussing the case dismissed over defendant's objection). See generally 50 C.J.S. *Juries* § 290 (1947 & Supp.1991).

We are aware that there was a high probability that the juror in question would have been one of the jurors that deliberat-

ed Cook's verdict had she not been excused.⁵ We are also aware that the prosecutor may have been motivated to seek the juror's dismissal at least in part because she had expressed a negative opinion about the presentation of the state's case. In certain circumstances there may be constitutional constraints on the trial court's exercise of discretion regarding whether to excuse a juror for cause, particularly when a juror has indicated that, from the evidence heard, he or she might be disinclined to vote for a conviction. See *United States v. Brown*, 823 F.2d 591, 596-97 (D.C.Cir. 1987) (reversal required under constitutional right to unanimous jury verdict when juror requested to be and was dismissed after deliberations had begun because the request may have stemmed from juror's belief that evidence was insufficient to support a conviction). In other circumstances, when there is no basis for the trial court's dismissal for cause, it may be prejudicial error requiring reversal to dismiss a juror who has disclosed opposition to a verdict sought by the prosecution. *People v. Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 16-17, 383 P.2d 412, 424-25 (1963).

We need not adopt or reject these opinions from other jurisdictions because Cook's case can be distinguished. In *Hamilton*, the reviewing court found that the trial court had erred in dismissing a juror because there was no factual basis to support the reason given by the trial court for the dismissal. The reviewing court went on to address the fact that the juror had expressed ostensible opposition to the verdict sought by the state in order to determine whether the trial judge's error was prejudicial. Here, in contrast, we have held that, given the facts before the trial court, the judge acted within his discretion in excusing the juror for violating his admonition. Because we have found no error, there is no issue of prejudice.

In *Brown*, the juror asked to be dismissed after the jury had begun deliberating, and not because he had violated the

5. Before the juror was excused, there had been thirteen jurors hearing the case. Because the alternate was to be selected by lot pursuant to

Rule 18.5(h), there was a 12 in 13 chance that some other juror would have been the one excused before deliberations began.

trial judge's admonitions but rat her because he felt he could not exercise his duty as an impartial juror. The record indicated that there was a "substantial possibility" that the juror "requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction." 823 F.2d at 596. Here, however, the juror told the judge that she had not yet formed any opinion as to Cook's guilt or innocence. *Cf. Hamilton*, 32 Cal. Rptr. at 17, 383 P.2d at 425 (to excuse juror who had expressly indicated she was disinclined to render verdict sought by the state was "tantamount to 'loading' the jury").

[14] The fact that we find no error does not excuse the conduct of the prosecutor. What happened in this case serves as a clear illustration of why, in most circumstances, the proper procedure upon becoming aware of possible juror misconduct is to inform the court as soon as possible and let the court conduct whatever investigation it deems warranted. *Cf. State v. Cady*, 248 Kan. 743, 811 P.2d 1130, 1140 (1991) ("The State's failure immediately to report to the court and to [defense] counsel the possibility of a juror's misconduct casts dark shadows upon the Fourteenth Amendment's guarantees of due process and the fundamental right to a fair trial").

Regardless of what the juror had actually said or done, and regardless of the source and reliability of the prosecutor's information, by conducting an investigation involving personal contacts with the juror's co-workers, the prosecutor created a situation in which it was only natural for the juror to "have at least an inhospitable atti-

6. Cook did not move for a mistrial when the juror was excused, so we need not and do not decide whether the court would have erred in denying such a motion. Having failed to move for a mistrial, and having thereby gambled on the results of the verdict from the twelve remaining jurors, Cook cannot claim the court erred in not granting a mistrial or in abridging his right to have the trial concluded before the jury that would, to a 12/13 probability, have included the juror that was excused. *See ante* note 5.

The prosecutor is nevertheless fortunate that reasonable grounds (outside of the juror's alleged antipathy toward him) were present to

tude toward Counsel for the State." R.T. July 5, 1988, at 14. Had the court been given an opportunity to conduct its own inquiry, it might have discreetly excused the juror, or determined that she was still fair and impartial and able to continue on the case. *See Cady*, 811 P.2d at 1141 ("If the prosecution had immediately reported the incident to the trial judge, the judge could have taken remedial action prior to discharging the alternate jurors.").

[15] Once the prosecutor had alienated the juror through his unauthorized investigation, the court's only realistic choices were to declare a mistrial or excuse the juror, neither of which is an ideal result.⁶ Furthermore, by conducting his own investigation of the juror, and then contradicting her sworn testimony before the judge based on his personal knowledge, the prosecutor effectively made himself a witness in the case.⁷ *See* ER 3.7, Rule 42, Ariz. R.Sup.Ct., 17A A.R.S. Finally, regardless of whether it was ultimately appropriate for the trial judge to excuse the juror, we believe that the judge himself should have identified and criticized the irregularity of the prosecutor's conduct in conducting his investigation and at the hearing. Hopefully he did so, although such action does not appear on the record.

E. Denial of Continuances

[16] Cook claims that the trial court deprived him of a fair trial by refusing to continue the trial to provide him with the opportunity to secure the testimony of two witnesses, Brian Galvin and James Dominic. Grant of a motion to continue "is with-

excuse the juror, for otherwise his conduct might have resulted not only in a mistrial, but in a double jeopardy bar to a new trial. *See* comment to Rule 18.4(b); *Evans v. Abbey*, 130 Ariz. 157, 634 P.2d 969 (Ct.App.1981); *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984).

7. During his examination of the juror, the prosecutor stated: "Your Honor, I would avow to the Court [the juror's co-worker] gave me a fairly detailed description of the videotape, [sic] of the walk-through and he claimed he had gotten that through conversation with [the juror]." R.T. July 5, 1988, at 13 (emphasis added).

in the discretion of the trial court, and its decision will only be disturbed upon a showing of a clear abuse of such discretion and prejudice to the defendant." *Amaya-Ruiz*, 166 Ariz. at 164, 800 P.2d at 1272.

In a hearing on his motion for a continuance, Cook asserted that Galvin would testify to Matzke's past and to the circumstances of the murders. The court stated its assumption—which Cook did not challenge—that the purpose of the testimony would be to show that Matzke was a homosexual and had engaged in various homosexual activities in the past, and that at some time in the past Matzke had beaten a victim with a club. The judge refused to grant a continuance because he believed that Galvin's testimony would be cumulative since these facts could be established by other witnesses, including Matzke himself.

During the trial, Cook informed the court that he wanted to call Dominic to the stand, but that he and his investigator had not yet been able to contact and interview him. Cook said that Dominic would testify to the character of Matzke, Cruz Ramos, and Swaney, and that he believed his investigator was currently conducting the interview. The court did not believe that Cook's offer of proof contained relevant information regarding Cruz Ramos or Swaney, but believed that further impeachment of Matzke would be cumulative and would "pale in comparison" to what Matzke himself had already admitted in court. The court therefore ruled that it would not continue the trial to wait for Dominic's possible testimony. The court did, however, agree not to rule out the possibility that Cook might be allowed to reopen his case and present Dominic's testimony should the interview produce relevant and significant information, but Cook did not thereafter renew his request to call Dominic to the stand.

The trial judge thoroughly considered the circumstances of the requests before determining that the testimony Cook sought to

secure would be irrelevant or cumulative. The court had already granted eight defense motions for continuances, including one made by Cook himself after taking over his own defense. Cook has not demonstrated any prejudice stemming from the trial court's rulings. Matzke did, in fact, admit on the stand the facts that Cook had stated he intended to establish through the unavailable witnesses.⁸ Nor did Cook inform the court whether his investigator had been able to locate Dominic, or whether Dominic had any relevant testimony to add. We therefore find that the trial court did not abuse its discretion in denying Cook's requests for continuances.

F. *Edwards* Claim

[17] At the initial appearance before the Lakew Havasu City Justice Court on July 21, 1987, the judge appointed an attorney for Cook. At the conclusion of the hearing, the judge asked Cook if he had any questions. According to Officer Richard Funder of the Lake Havasu City Police Department, Cook responded "if I'm found guilty of this, I want the death penalty." Prior to trial, Cook moved to suppress his statement, arguing that it was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The trial court denied Cook's motion, finding that although Cook was in custody, he was not being interrogated at the time he made the statement, and that his statement was voluntary. Testimony about Cook's statement was ultimately admitted at trial.

The trial court was correct in ruling that the Lake Havasu City Court judge did not interrogate Cook when he asked Cook if he had any more questions. Because Cook's statement did not result from a custodial interrogation, his *Edwards* rights were not violated. *Id.* at 486-87, 101 S.Ct. at 1885 (citing *Rhode Island v. Innis*, 446 U.S. 291, 298 n. 2, 100 S.Ct. 1682, 1688 n. 2, 64 L.Ed.2d 297 (1980)).

8. Matzke took the stand at trial and admitted his participation in the killings and in the torture of Cruz Ramos. He further admitted having had homosexual relationships, having hit a

fellow student in the head with a hockey stick in eighth grade, and having previously undergone substance abuse counseling.

[18] Cook also challenges the admission of his statement on relevance grounds. He argues that the statement was admitted in contravention of the court's order precluding reference to the possible punishment.⁹ Cook made no objection when Officer Funder testified to his statement at trial. Because Cook did not object, the trial judge had no opportunity to consider the testimony in relation to the order in limine regarding references to punishment or to conduct a Rule 403 hearing.

Ordinarily, absent fundamental error, objection for the first time on appeal is waived; however, "where a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial." *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985). Cook did not raise the issue of relevance in his written motion in limine, but at the hearing on the motion he did argue that the statement was irrelevant because the jury was not to take into consideration any comments about the possible penalty he might face if convicted.¹⁰ The issue of the statement's relevance was thus arguably preserved for appeal, and we therefore address the merits of Cook's claim.

[19] Cook's statement would be irrelevant if offered to suggest to the jury that he might face the death penalty if convicted. There is, however, another plausible purpose for the statement: the statement could reasonably be interpreted as evidence of a guilty mind, and would as such be relevant on the issue of guilt. "For Rule 401 purposes, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). If the jury believed the statement to be evidence of Cook's culpable mental state, its probative

value would outweigh any unfair prejudice to Cook from having the death penalty merely mentioned in front of the jury. The problem here was one of interpretation, a matter within the province of the jury, and we believe the trial judge did not abuse his discretion by allowing the jury to consider the statement.

G. Matzke's Plea Agreement

Cook claims that the terms of the plea bargain through which the state secured Matzke's testimony against him violated his due process and confrontation rights under the state and federal constitutions. On October 30, 1987, Matzke agreed to plead guilty to one count of second degree murder and to testify against Cook. In return, the state dropped the first degree murder charges against him. The plea agreement contained the following provision:

John Eugene Matzke will, during such interviews and during such testimony, provide truthful responses to any questions put to him and will not knowingly make any false or misleading statements. *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.*

(Emphasis added.)

Cook does not, and cannot, challenge the requirement that Matzke testify fully and truthfully. Rather, Cook argues that the state improperly influenced Matzke to testify against him. The essence of Cook's argument is that Matzke's trial testimony was wrongly coerced because his plea agreement was conditioned on his testimony being *consistent* with prior statements he had made to the police and prosecution.

9. Cook's motion to suppress the statement and the state's motion in limine regarding references to punishment were argued at the same evidentiary hearing. The motion to suppress was argued first, so at the time that motion was denied, the court had not yet ruled on the motion in limine.

10. The trial judge did not expressly rule on the relevance challenge, but simply denied the suppression motion.

If he violated the condition, his plea bargain could be rescinded and first degree murder charges reinstated against him. Matzke had already made a videotaped confession to the police, and if the charges were reinstated he would face, as he was told by the judge who had accepted his guilty plea, "an almost certain death penalty."

We faced a plea bargain raising similar concerns in *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984). *Fisher* concerned whether a witness was improperly motivated to assert the fifth amendment and refuse to testify at trial to secure the benefits of a plea agreement. That plea agreement contained a provision that "if she is called as a witness ... and required to testify, her testimony will not vary substantially in relevant areas to statements previously given...." *Id.* 141 Ariz. at 244, 686 P.2d at 767. This court remarked that the plea agreement was "unusual, if not unethical," but held that the witness' decision to assert the fifth amendment was not necessarily motivated by the plea agreement. We noted that

[t]hough we need not determine the validity of this agreement, we do question its propriety. We recognize the benefits to be gained from granting a defendant immunity in exchange for truthful testimony, and for granting plea bargains in the interest of judicial economy.... [Citation omitted.] The instant case involves more than that. The prosecution did not condition conviction for a lesser offense on a defendant's promise to tell the truth. Instead, the prosecution conditioned conviction for a lesser offense on a defendant's promise to be *consistent*. By doing so, the prosecution may have overstepped the bounds of the law and its ethical responsibility to "scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand." A.B.A. Canons of Professional Ethics 39. We remind the prosecution that a public prosecutor's duty is "to

seek justice, not merely to convict" and that a public prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage his case or aid the accused. A.B.A. Model Code of Professional Responsibility, Ethical Consideration 7-13.

141 Ariz. at 244 n. 5, 686 P.2d at 767 n. 5 (emphasis added).

[20] Cook made no pre-trial motion to suppress Matzke's testimony. Nor did he object when Matzke was called to testify at trial or when Matzke's testimony revealed the terms of his plea agreement. Absent fundamental error, Cook thus waived any claim that the trial judge erred in failing to suppress Matzke's testimony because of the offending provision in the plea agreement. Further, the trial judge, having heard no objection on this issue, had no occasion to develop a record or issue an appropriate remedial order.

[21] The record in this case is inadequate to permit us to determine as a factual matter whether Matzke's plea agreement was such that his testimony was coerced, thus denying Cook a fair trial. Matzke testified at trial that his plea agreement provided that "[i]f I change my testimony or deviate from what it was before, I be held [sic] in perjury and plea can be denied," but he also testified that he had agreed "to tell the truth about what happened that night." R.T. June 28, 1988, at 18, 52.

We have previously suggested that this court is not the appropriate forum in which to raise for the first time a claim of ineffective assistance of counsel because such a determination requires an examination of the record as a whole to establish the reasons behind counsel's actions or inactions. *See State v. Valdez*, 160 Ariz. 9, 14-15, 770 P.2d 313, 318-19 (1989). It is likewise inappropriate for us to consider the fundamental error issue that Cook raises for the first time here; the trial court has not had the opportunity to conduct an evidentiary hearing on the question and to develop a record on the issue for us to examine on appeal. The preferred procedure is for Cook to

raise the issue of whether Matzke's testimony was impermissibly coerced because of the plea agreement in a proceeding for post-conviction relief. See *id.* at 15, 770 P.2d at 319. Our ruling here does not foreclose this possibility.

We recognize that there is a line of cases holding that when an accomplice testifies under an agreement containing a provision conditioning the agreement on testimony consistent with prior statements, the testimony is so tainted that its admission violates the defendant's right to a fair trial. E.g., *People v. Medina*, 41 Cal.App.3d 438, 116 Cal.Rptr. 133 (1974). Cf. *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985); *Humboldt County Sheriff v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991) (so long as plea agreement is not contingent upon state obtaining a conviction, and testimony is not scripted, due process is not violated, and existence of plea bargain goes to weight rather than admissibility of evidence). Because we are unable to address the merits of Cook's position on the record before us, we do not decide whether to adopt the rationale of *Medina*, *Dailey*, *Acuna*, or another position. We adhere, however, to our view of the ethical problems inherent in contingent plea agreements that we elaborated in *Fisher*. We are constrained merely to comment that we consider it strange that such an agreement be made three years after *Fisher's* warning about the use of such agreements and that counsel failed to call the issue to the court's attention.

H. Denial of Instruction on Second Degree Murder

Cook requested that the trial court instruct the jury on second degree murder. He claims the court erred in refusing the instruction.

[22] "In capital cases, the trial judge must instruct" the jury on all "those lesser included offenses that the evidence will support." *State v. Clabourne*, 142 Ariz. 335, 345, 690 P.2d 54, 64 (1984); see also *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *State v. Schad*, 163 Ariz. 411, 417, 788 P.2d 1162,

1168 (1989), *aff'd*, — U.S. —, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). On the other hand, "the trial judge need not instruct" the jury on "lesser included offenses which are not supported by the evidence." *Clabourne*, 142 Ariz. at 345, 690 P.2d at 64. "To warrant the charge of second degree murder, the evidence reasonably construed must tend to show a lack of premeditation and deliberation. 'The presence of such evidence is the determinative factor.'" *Id.* (quoting *State v. Sorensen*, 104 Ariz. 503, 507, 455 P.2d 981, 985 (1969)) (emphasis in original); see also *Schmuck v. United States*, 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1450 n. 8, 103 L.Ed.2d 734 (1989) (Supreme Court's decision in *Schmuck* "in no way alters the independent prerequisite for a lesser included offense instruction that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater").

In this case, the trial court refused Cook's proposed instruction on second degree murder because the court did not see "any basis upon which the jury could feel that the Defendant committed these murders without premeditation." Matzke's testimony at trial indicated that he and Cook had discussed killing Cruz Ramos and had decided to kill him at least thirty minutes before they actually committed the murder. In addition, Cruz Ramos died from strangulation, and Matzke's testimony further indicated that, because of several unsuccessful attempts, fifteen minutes passed between the time that the attempt to murder Cruz Ramos began and the time that Cruz Ramos appeared to die. Swaney also died from strangulation. Matzke testified that he and Cook tried to strangle Swaney with a sheet, and when they failed Cook said "this one's mine" and proceeded to kill Swaney. There was no evidence that these murders were committed in the heat of passion or as the result of a quarrel. See A.R.S. § 13-1101(1). The record supports the trial court's finding that there was no basis for a jury to find that the murders were committed without premeditation, and we will not disturb that finding.

[23] Cook also argued at trial, and argues again on appeal, that he was entitled to a jury instruction on second degree murder because Matzke was permitted to plead guilty to second degree murder. Cook contends that under Rules 17.3 and 26.2(c) the judge was required to establish that there was a factual basis for Matzke's plea before accepting it; therefore, there must also have been facts warranting an instruction on second degree murder for Cook. Despite its syllogistic appeal, we reject this argument. The fact that a judge accepted Matzke's guilty plea to a charge that did not include an element of premeditation is irrelevant. The overwhelming evidence before the court at trial was that Cook either killed with premeditation or not at all. The trial court did not err in refusing to instruct the jury on second degree murder.

II. Death Penalty Issues

[24] Whenever the trial court imposes the death penalty, we review the record and make a separate and independent determination of whether the death sentence is appropriate. *State v. McMurtrey (McMurtrey I)*, 136 Ariz. 93, 101, 664 P.2d 637, 645, *cert. denied*, 464 U.S. 858, 104 S.Ct. 180, 78 L.Ed.2d 161 (1983). We do this by reviewing the aggravating and mitigating circumstances found by the trial court to ensure that they were properly determined and weighed. *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).

A. Aggravation/Mitigation Issues

The trial judge held an aggravation/mitigation hearing, and returned a special verdict pursuant to A.R.S. § 13-703(F). He found the following aggravating circumstances to apply to the murders of both Cruz Ramos and Swaney: (1) each murder was committed in an especially cruel, heinous, and depraved manner under § 13-703(F)(6); and (2) Cook was convicted of another homicide committed during the commission of each murder under § 13-703(F)(8). He also found that the murder of Cruz Ramos was committed in expectation of pecuniary gain under § 13-

703(F)(5). The trial judge found no mitigating factors, and therefore sentenced Cook to death on both counts of first degree murder.

1. Aggravating Circumstances

a. Especially Cruel, Heinous, or Depraved

[25] Cook argues that the trial court erred in finding that the murder of Cruz Ramos was especially cruel, heinous, or depraved because it was Matzke, not Cook, who actually killed the victim. Although Cook was not convicted of felony murder, the trial court nevertheless made an *Enmund/Tison* finding that Cook's involvement in the murder was sufficient to warrant a possible death sentence. See *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). While Matzke ultimately succeeded in strangling Cruz Ramos by himself, he did so only after he had been unable to do so with Cook's assistance in pushing the pipe against Cruz Ramos' throat. The record clearly supports the trial court's finding that Cook assisted in the murder of Cruz Ramos. See *State v. Correll*, 148 Ariz. 468, 477-78, 715 P.2d 721, 730-31 (1986) (defendant helped bind victims, drove them into desert, and encouraged actual killer to kill one victim).

[26] Next, we must determine whether the trial judge properly determined that the murders were especially cruel, heinous, or depraved. "The terms 'cruel, heinous, or depraved' are considered disjunctively; a finding of any one of the three constitutes an aggravating circumstance under our statute." *Amaya-Ruiz*, 166 Ariz. at 177, 800 P.2d at 1285. "To support a finding of cruelty, the state must prove beyond a reasonable doubt that the victim was conscious and suffered pain or distress at the time of the offense." *State v. Jimenez*, 165 Ariz. 444, 453, 799 P.2d 785, 794 (1990) (citing *State v. Villafuerte*, 142 Ariz. 323, 690 P.2d 42 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1234, 84 L.Ed.2d 371 (1985)). The facts recounted at the beginning of

this opinion leave no doubt that the killings were "cruel" as we have defined the term.

"The terms 'heinous' and 'depraved' focus upon a defendant's state of mind at the time of the offense." *Amaya-Ruiz*, 166 Ariz. at 178, 800 P.2d at 1286. An especially heinous murder is one "that is 'hatefully or shockingly evil,'" and a "murder is depraved if 'marked by debasement, corruption, perversion or deterioration.'" *Id.* (quoting *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978)). The facts of these killings provide a clear example of what we meant in *Knapp*.

We have set forth five factors to be considered in determining whether a defendant's conduct was especially heinous or depraved:

1. the relishing of the murder by the defendant;
2. the infliction of gratuitous violence on the victim beyond that necessary to kill;
3. mutilation of the victim's body;
4. the senselessness of the crime;
- and
5. the helplessness of the victim.

Amaya-Ruiz, 166 Ariz. at 178, 800 P.2d at 1286 (quoting *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983)). Again, the facts of these killings fit within the factors enumerated.

The trial court found, and we agree, that both murders were so especially cruel, heinous, and depraved that it was needless to belabor the issue. There is no doubt in our minds that each of these crimes of brutal and senseless torture, sodomy, and murder falls clearly within § 13-703(F)(6), if not at the extreme end of the spectrum.

b. Expectation of Pecuniary Gain

[27] The trial court found that Cook murdered Cruz Ramos in expectation of pecuniary gain under A.R.S. § 13-703(F)(5). The court made an analogy to cases in which murder was committed "to successfully complete or to get away with the robbery." In *State v. LaGrand*, 153 Ariz.

21, 35, 734 P.2d 563, 577, *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987), we explained that "the state must show the actor's *motivation* was the expectation of pecuniary gain," and that "[p]ecuniary consideration must be a cause of the murder, not merely a result" (quoting *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985); *State v. Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984)). We held that the fact the defendant was in the bank to commit a robbery "infect[ed] all other conduct." *LaGrand*, 153 Ariz. at 35, 734 P.2d at 577.

We agree with the trial court that the first murder was committed in expectation of pecuniary gain. The events leading to Cruz Ramos' murder began when Cook stole approximately \$90 from Cruz Ramos' money pouch. Shortly thereafter, Cruz Ramos noticed his money pouch was missing. Cook told him to look upstairs in the bathroom, and then told him to look in Cook's bedroom. Once in Cook's bedroom, Cook pushed Cruz Ramos down on the bed. Matzke ripped up a couple of bed sheets, and together they tied up Cruz Ramos. Cook then hit Cruz Ramos in the face with his fists and asked him how much money he had. Cruz Ramos replied "about \$90," and Cook took money out of his own pants pocket, said "\$97," and threw the money on the ground. Cook and Matzke subsequently rummaged through Cruz Ramos' possessions to "see if he had anything else stashed." After Cruz Ramos got loose and tried to flee, Cook and Matzke caught him and bound him more securely. Events then escalated, concluding in Cruz Ramos' murder.

The causal link between the robbery and the murder is clear. Cruz Ramos was bound to a chair after discovering the robbery, both to keep him from escaping and to allow Cook and Matzke to determine whether he had anything else they could steal. When Cruz Ramos tried to escape, he was bound and tortured. When Cook and Matzke decided they could not let him go, he was finally killed. *Compare* cases

in which pecuniary gain was found: *State v. Marlow*, 163 Ariz. 65, 786 P.2d 395 (1989) (defendant kidnapped man who had been flashing money in Las Vegas, robbed him shortly after driving into Arizona, took him out of the car and kicked him over a cliff, then hit him on the head with a boulder); *State v. Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989) (defendant robbed gas station and killed the attendant); *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989) (defendant and accomplices robbed victim in parking lot; defendant then took victim into the desert and shot him), *aff'd*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *State v. Stevens*, 158 Ariz. 595, 764 P.2d 724 (1988) (defendant robbed co-worker and another victim at gunpoint, then shot the latter); *State v. Nash*, 143 Ariz. 392, 405, 694 P.2d 222, 235 (defendant shot employee at coin shop, then stole \$600; court found "plan to rob and a murder which furthered that plan"), *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985); and *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984) (defendant made witnesses to bar robbery lie on the floor, then shot them); with cases where pecuniary gain was not established: *State v. Prince*, 160 Ariz. 268, 772 P.2d 1121 (1989) (defendant killed victim to whom he owed money from drug transactions, but evidence did not demonstrate beyond a reasonable doubt that he had killed victim to escape the debt); *State v. Wallace*, 151 Ariz. 362, 728 P.2d 232 (1986) (defendant killed his girlfriend and her children, then took \$10 from her purse and went in her car to liquor store; court found taking of property to be incidental to the murder), *cert. denied*, 483 U.S. 1011, 107 S.Ct. 3243, 97 L.Ed.2d 748 (1987); *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (court would not find pecuniary gain since jury had acquitted defendant on aggravated robbery and theft charges), *cert. denied*, 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 332 (1984); and *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (1983) (defendant kidnapped and repeatedly raped victim, took her to her home and raped her again, and only then rifled through her possessions and took bank card and other valuables before killing her; court found

that evidence, including defendant's confession, indicated he killed her to eliminate her as witness to her own rape).

c. Conviction on One Homicide Committed During the Commission of Another

[28] The trial court found as an aggravating circumstance that Cook had "been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense." A.R.S. § 13-703(F)(8). Cook challenges this finding on two grounds. First, he argues that the trial court improperly considered this aggravating circumstance *sua sponte*. Second, he argues that, as a factual matter, the two homicides were unrelated and separated by several hours, and thus may not each be considered as "committed during the commission of the [other] offense."

On August 5, 1988, the prosecutor sent a sentencing memorandum to the court and to Cook. The sentencing hearing took place three days later. The prosecutor offered no new evidence at the sentencing hearing, but relied instead on evidence adduced at trial. Cook offered no rebuttal evidence other than a general statement of his innocence and the fact that he had not been charged or convicted of a felony or violent crime prior to his arrest on July 21, 1987. Cook added that the "[o]nly sentence I will accept from this Court at this time is the penalty of death." R.T. August 8, 1988, at 4.

The trial court noted at the sentencing hearing that the prosecutor had not discussed the applicability of the § 13-703(F)(8) aggravating circumstance in his sentencing memorandum. The judge asked the prosecutor whether he had simply overlooked that factor, or whether he felt that it did not apply to Cook's case. The prosecutor replied that "[i]t was simply overlooked." The court nevertheless found this aggravating circumstance to be present.

We have previously held that due process in a § 13-703 hearing requires that the prosecutor give defendant "(1) disclosure of the aggravating circumstances the state

will seek to prove; (2) disclosure of the evidence the state will use; and (3) disclosure sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal." *State v. Ortiz*, 131 Ariz. 195, 207, 639 P.2d 1020, 1032, *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982). Even short notice may be timely where a defendant could have offered no rebuttal, did not ask for a continuance of the hearing, and was not prejudiced. *Id.* 131 Ariz. at 208, 639 P.2d at 1033 (two days' notice to defense sufficient for prosecutor to use defendant's concurrent conspiracy conviction as a § 13-703(F)(1) prior conviction).

Cook neither objected to the court's consideration of § 13-703(F)(8) nor requested a continuance. In addition, the fact of Cook's two murder convictions was evident from the verdict itself, so there was nothing for Cook to rebut. Under these circumstances, it is obvious that the prosecutor's failure to notify Cook about this aggravating circumstance did not prejudice Cook in any way.

[29] Cook's contention that the two murders were not sufficiently factually related to establish the § 13-703(F)(8) aggravating factor is without merit. The two murders were committed during "a continuous course of criminal conduct." *Lavers*, 168 Ariz. at 394, 814 P.2d at 351. Swaney was detained because he had been shown the corpse of Cook and Matzke's first victim. He was then sodomized and murdered because Cook and Matzke decided they could not let him go after what he had seen. The trial court found that "even though there were perhaps a couple of

hours that separated the murders ... they were for all practical purposes committed at the same time and [in] one continuous course of conduct." R.T. August 8, 1988, at 15. We agree.¹¹

2. Mitigating Factors

Cook offered no evidence in support of any mitigating factors to supplement the evidence already presented at trial. He requested only that the trial court consider the fact that he had never before been charged or convicted of a felony or violent crime. The trial court considered this evidence,¹² but found no mitigating circumstances. In coming to this conclusion, the trial judge stated that he had reviewed the presentence report, the Rule 11 reports,¹³ the state's sentencing memorandum, all other matters that had been addressed, all hearings that had been held, a letter from Cook to the probation officer who prepared the presentence report, and the testimony at trial.

a. Defendant's Intoxication and Mental History

[30] Cook argues that the trial court's preclusion of evidence of intoxication at trial resulted in the court's rejection of intoxication as a mitigating factor. We have already explained that the preclusion applied only to the trial, and not to the sentencing hearing, and there is nothing in the record to indicate that Cook was misled to believe otherwise. The mere fact that Cook, who chose to represent himself, did not fully understand this distinction is not grounds for relief. We note again that

11. We acknowledge that the killings were not committed as part of a common scheme, nor did they arise out of a common intent to commit murder or out of a plan to eliminate witness who came upon the scene. Unlike what occurred in *Lavers*, the victims were not present together at the crime scene.

Nevertheless, even if Cook were correct that the homicides may not have been committed "during the commission of the offense," a different aggravating factor would be present. If the homicides were not simultaneous, then they were successive, and the aggravating factor in § 13-703(F)(1) would be present, at least with respect to the murder of Swaney. See *State v.*

Smith, 131 Ariz. 29, 30-31, 638 P.2d 696, 697-98 (1982) (defendant was convicted of two counts of first degree murder, and conviction on each count was used as an aggravating circumstance for the other count).

12. The trial judge found that given Cook's extensive history of misdemeanors, his lack of previous felonies or violent crimes was not a circumstance to be weighed in mitigation.

13. These reports were prepared in the course of determining that Cook was competent to stand trial, and consist of evaluations by mental health professionals. See Rule 11.

Cook did not present evidence of intoxication, nor of any other mitigating factor, at the sentencing hearing. Our review of the trial court's finding is therefore based on the evidence in the record before the trial court.

[31] Cook also claims that the trial court erroneously refused to consider his history of mental problems as a mitigating circumstance. He states that the record contained undisputed facts and opinions regarding his psychological and neurological history that the trial court ignored.

Under § 13-703(G)(1), the sentencing judge must consider whether the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." The trial court acknowledged that there was some evidence of intoxication and drug use in the record, but that on the evidence before him, he did not feel justified in finding that Cook was under the influence of alcohol or drugs such that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was affected.

The trial court also stated that it had considered Cook's history of mental problems evidenced by the Rule 11 examination reports and the presentence report. He further noted Cook's previous attempts at suicide. He concluded, however, 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." He added that Cook's impressive manner of conducting his criminal defense "reinforces my impression that whatever prior mental problems that the Defendant has had are in the past; that they did not directly impact upon the commission of these murders...." R.T. August 8, 1988, at 19-20.

The trial court's ruling that the evidence of intoxication and mental problems was

insufficient to establish significant impairment of Cook's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was based on the trial judge's assessment of the weight and credibility of the evidence before him. Consequently, we defer to his conclusion.¹⁴ *State v. Fierro*, 166 Ariz. 539, 553, 804 P.2d 72, 86 (1990).

[32] Our review, however, does not end here. We have previously held that even if the trial court does not find sufficient evidence to establish the § 13-703(G)(1) mitigating circumstance of "insufficient capacity," the court must further review all of the evidence for any independent mitigating effect that suggests in some way that the defendant be treated with leniency. *Fierro*, 166 Ariz. at 553, 804 P.2d at 86; *McMurtrey I*, 136 Ariz. at 102, 664 P.2d at 646.

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. "The trial court is not required to find a mitigating circumstance; nor is it required to make a statement that none has been found. The trial court must, however, consider the evidence." *McMurtrey I*, 136 Ariz. at 102, 664 P.2d at 646. The record indicates that the trial judge did just that. Moreover, after conducting our independent review of the record, we do not believe that Cook's mental history demands or even justifies leniency, especially when balanced against the aggravating factors found to be present in this case.

b. Disparity with Codefendant's Sentence as Mitigation

[33] Cook argues that the trial court erroneously failed to consider as a mitigating factor the fact that Cook's equally culpable codefendant received a twenty-year sentence as the result of a plea bargain. The state points out that the court did not

14. The most significant evidence of Cook's possible impairment is contained in the Rule 11 reports prepared by Daniel W. Wynkoop, Ed.D., and Eugenie R. Almer, M.D. Their assessments

of Cook's intoxication and its possible effects were based, however, on Cook's own statements, and the trial court was free to doubt the veracity of those statements.

consider this fact in mitigation because Cook never requested the trial court to do so. We note, however, that the trial judge stated in the record that he had considered "to some extent the proceedings as they relate to ... Mr. Matzke."

Cook is correct that, as a general matter, disparity in sentences is a relevant factor to be considered in weighing the appropriateness of the death penalty. In *Marlow*, the trial court sentenced the defendant to death, while his codefendant received a four-year prison sentence under a plea bargain; the trial court ruled that disparity in sentencing was not a mitigating factor to be balanced against aggravating factors. We disagreed, stating that

[s]imply because an accomplice has received leniency does not in itself prevent the imposition of the death penalty. We appreciate the difficult tactical choices that must sometimes be made by the prosecution in obtaining a conviction. However, once that conviction has been obtained, disparity between the sentences of the sort that occurred in this case must be considered and may be found as a mitigating circumstance and weighed against any aggravating circumstances, in determining whether to impose the death penalty.

163 Ariz. at 72, 786 P.2d at 402 (citations omitted); see also *State v. Lambright*, 138 Ariz. 63, 76, 673 P.2d 1, 14 (1983), cert. denied, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984).

We believe that Matzke's twenty-year sentence is not so disproportionate to Cook's as to outweigh the aggravating circumstances present in this case. This is not a situation like that in *Lambright*, in which a "codefendant" was granted immunity from prosecution in return for her testimony, and so served not a single day in jail despite the trial judge's conclusion that she was as guilty as the other defendants who received death sentences. 138 Ariz. at 76, 673 P.2d at 14. Nor is this case like *Marlow*, in which the probation officer who prepared the presentence report testified that she considered the codefendant's four-

year prison sentence a "travesty of justice." 163 Ariz. at 71, 786 P.2d at 401.

3. *Disposition of Aggravation/Mitigation Findings*

[34] We have reviewed the record for evidence of aggravating circumstances and mitigating factors. We agree with the trial court that the state has established the existence of the aggravating factors beyond a reasonable doubt. We also agree with the trial court's finding that there is insufficient evidence to establish any of the statutory mitigating factors. We find no evidence supporting any independent mitigating factor warranting leniency. Because the aggravating factors outweigh the mitigating circumstances, we find that the trial court correctly imposed the death sentences.

B. Proportionality Review

[35] We must also conduct a proportionality review to determine whether imposition of the death penalty in this case violates the eighth amendment. The issue is whether the death penalty imposed upon this defendant is excessive or disproportionate to the penalty imposed on defendants in other cases. *State v. Roscoe*, 145 Ariz. 212, 227, 700 P.2d 1312, 1327, cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 525 (1985). We have reviewed our other cases and find that Cook's death sentence is not disproportionate. The facts of this case require no further elaboration. See *id.* (egregiousness of facts obviated need for extensive proportionality review).

CONCLUSION

We have examined the record for fundamental error pursuant to A.R.S. § 13-4035, and have found none. For the reasons detailed above, we affirm Cook's convictions and sentences.

GORDON, C.J., and CAMERON, J.,
concur.

MOELLER, Justice, specially concurring in part.

I agree with all portions of the majority's opinion except the portion entitled "Proportionality Review." For reasons which have previously been stated, I do not believe this court should be engaging in proportionality reviews. *See State v. White*, 168 Ariz. 500, 815 P.2d 869 (1991); *State v. Greenway*, 170 Ariz. 155, 823 P.2d 22 (1991).

CORCORAN, Justice, specially concurring in part.

I join in Justice Moeller's special concurrence.



821 P.2d 757

**In the Matter of Lawrence B. SLATER,
a Member of the State Bar of
Arizona, Respondent.**

Comm. No. 89-1876.

Supreme Court of Arizona,
Before the Disciplinary Commission.

Dec. 27, 1991.

JUDGMENT OF CENSURE

This matter having come on for review before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision, and no timely appeal therefrom having been filed,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Lawrence B. Slater, a member of the State Bar of Arizona, is hereby censured and condemned for conduct unworthy of and in violation of his duties and obligations as a lawyer, as disclosed in the captioned proceedings.

2. Respondent shall pay to the State Bar of Arizona costs and expenses incurred in this matter in the sum of \$959.97, with

interest at the legal rate, within thirty days from the date hereof as provided by law.



821 P.2d 757

Sherri GREVES, Plaintiff-Appellant,

v.

**OHIO STATE LIFE INSURANCE
COMPANY, an Ohio corporation,
Defendant-Appellee.**

No. 1 CA-CV 89-462.

Court of Appeals of Arizona,
Division 1, Department C.

Nov. 26, 1991.

Beneficiary brought action against insured to recover proceeds of life policy. The Superior Court, Maricopa County, No. CV 88-17348, Stephen A. Gerst, and Pamela J. Franks, JJ., granted summary judgment in favor of insurer, and beneficiary appealed. The Court of Appeals, Taylor, J., held that: (1) incontestability clause required the insured to survive for two years; (2) untimely denial of claim did not require the insurer to pay face value; but (3) rescission was not available if misrepresentation by insured only caused the insurer to issue the policy at a lower premium, rather than causing it to issue the policy at all or causing it to cover a particular hazard.

Affirmed in part and reversed in part and remanded.

1. Insurance ⇐400.2

Incontestability clause in life policy which stated that the insured cannot contest it after "it has been in force, during your lifetime, for two years from the date of issue" required the insured to live for a minimum of two years before the policy would become incontestable. A.R.S. § 20-1204.