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IN THE SUPERIOR COURT OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

State of Arizona, Plaintiff, v. Joseph R. Wood, Defendant.	)	No. CR-28449 Petition for Postconviction Relief

Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Joseph R. Wood is entitled to relief from his unconstitutional convictions and sentences pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, sections 4, 15, and 24 of the Arizona Constitution. In this petition, Mr. Wood seeks relief from his unconstitutional direct appeal proceeding, which not only resulted in the Arizona Supreme Court

applying an unconstitutional restraint on mitigating evidence but also occurred while he was represented by counsel who had an actual conflict of interest. This Court is not precluded from reviewing these claims because they both involve an issue of significant constitutional magnitude that has never been waived and because there was a significant change in Arizona law after Mr. Wood's post-conviction proceedings had ended. For these reasons, Mr. Wood asks this Court to review his petition and grant appropriate relief.

I. Facts

During the penalty phase of his capital trial, Joseph Wood presented compelling mitigation evidence which was not causally-connected to the crimes for which he had been convicted. This evidence included that Mr. Wood's father, who served a tour of duty in Vietnam, and his mother were alcoholics. They fought violently on a regular basis and Mr. Wood's father whipped his son with a belt and was verbally abusive to the family. Ex. C, p. 2-3 [Report of Larry A Morris, Ph.D.]; ROA at 506. Mr. Wood's father developed his own addiction to alcohol after returning from Viet Nam. ROA at 504. He drank "to compensate for nerves, pressure, stress, memories[,]" indicating he may have suffered from Post-Traumatic Stress Disorder. *Id.*

The mitigating evidence also detailed Mr. Wood's significant history of

brain damage. Between the ages of two and three, he was knocked unconscious when he ran into a wall. ROA at 511-12. At age eleven, he lost consciousness after being punched between the eyes. ROA at 681. He was involved in a motorcycle accident in 1974, two in 1978, one in December 1981, and two in November 1984, after which he reported neck pain and headaches. *Id.*; ROA at 529, 753. Mr. Wood suffered from "bilateral temporal headaches, sudden in onset. . .some nausea and blurred vision." ROA at 753. After a 1978 accident, he reported "several lapses of memory" and continued headaches. ROA at 746.

In the first of the most significant accidents, when he was a teenager, Mr. Wood "flipped a motorcycle at 60 miles an hour and. . .land[ed] on his head." Ex. A, p. 2 [Report of James Allender, Ph.D]. Although wearing a helmet, he was rendered unconscious in this accident, just one of the four times he suffered a loss of consciousness following head trauma. *Id*., p.2; Ex. B, p. 3. In 1978, he was struck by a car and "flipped over the hood. . .." Ex. A, p.2. He had such severe head pain that he sought treatment at a hospital. *Id*. In 1981, he was involved in another motorcycle accident when his tire blew out and he lost control of the bike. *Id*. One of these head injuries was severe enough to require a week-long hospitalization. EX. B, p. 3.

After graduating from high school, Mr. Wood served six years in the United

States Air Force. Ex. B, p. 2 [Report of Catherine L. Boyer, PhD.] Although he performed well during his first few years of service to his country, his performance deteriorated following the numerous head injuries and as his substance abuse disorder manifested itself. Ex. C, p. 3. Mr. Wood also has a history of severe depression, including at least one suicide attempt. Ex. B, p. 3. Intervention by his parents prevented another attempt on a separate occasion. *Id*., p. 3.

Joe Wood suffered from a severe substance abuse disorder which began when he was only a teenager. Ex. B, p. 2. He eventually became dependent upon alcohol, cocaine and methamphetamine. Ex. A, p. 2; Ex. B, p. 2. His father also suffered from an alcohol abuse disorder. Ex. B, p. 2. In 1984, Mr. Wood sought treatment for his drug and alcohol abuse disorder in the same VA program his father attended. Ex. A, p. 2; Ex. C, p. 3-4. He stayed sober for over two years but, when he lost his job and his father began drinking again, Mr. Wood succumbed as well. Ex. C, p. 4. After relapsing, he drank heavily every day and, for the month prior to the shootings, used methamphetamine on an almost-daily basis. Ex. B, p. 4.

The evidence further showed that Mr. Wood's IQ is below average and he suffers from a learning disability which required special assistance in school. Ex. A, p. 3-4; Ex. B, p.2. Given the substantial evidence of injuries to his brain, which

can have a significant impact on impulse control and ability to deliberate one's actions, it is unsurprising that doctors found his "reality testing does deteriorate. . .in emotionally charged situations" and that, when his "coping mechanisms deteriorate, [his] intellectual capabilities are overwhelmed and he has difficulty organizing his thinking. In emotional situations he is likely to act on his feelings without thinking." Ex. A, p. 3-4. Mr. Wood struggles with "[i]mpulsivity and poor judgment" and is "clearly a dysfunctional individual." Ex. C, p. 6.

After Mr. Wood was convicted and sentenced to death for the murders of Eugene and Debra Dietz, an automatic appeal was filed and new counsel, Barry Baker Sipe, appointed. On March 19, 1992, Baker Sipe, filed a "Motion to Withdraw and Request For Appointment of Substitute Counsel on Appeal" in the Arizona Supreme Court. In that motion, Baker Sipe informed the Court he had accepted employment with the Pima County Legal Defender's Office, which had previously been ordered to withdraw from representing Mr. Wood because of a conflict of interest, due to its prior representation of Debra Dietz, one of the murder victims. Ex. D.

On March 25, 1992, in response to correspondence from Baker Sipe, Mr. Wood wrote, "[p]lease note that I do not wish to waive the conflict of interest issue created by your employment with the Pima County Legal Defender's

Office." Ex. E. On the same day, the Supreme Court granted the motion to withdraw. The order explicitly recognized that a conflict of interest existed:

> ...and it appearing that counsel for Appellant/Cross-Appellee would have a conflict of interest due to his employment with the Pima County Legal Defender's Office if the motion were not granted,
>
> IT IS ORDERED granting counsel's motion to withdraw.
>
> IT IS FURTHER ORDERED remanding this matter to the Pima County Superior Court for appointment of counsel.

Ex. F. For reasons not apparent in the record, the Superior Court did not comply with the order, and failed to appoint conflict-free appellate counsel for Mr. Wood. Ignoring its own order, the Supreme Court allowed the appeal to proceed.

The Arizona Supreme Court subsequently affirmed Mr. Wood's convictions and sentences. Despite all of the known mitigating evidence, the Court refused to consider much of it in its independent review of Mr. Wood's death sentences because it did not cause Mr. Wood to commit the crimes. *State v. Wood*, 180 Ariz. 53, 72, 881 P.2d 1158, 1177 (1994).

II. THE ARIZONA SUPREME COURT'S *LOCKETT/EDDINGS* ERROR

A. *The Arizona Supreme Court unconstitutionally rejected mitigating evidence in affirming the death sentences.*

In its opinion rejecting Mr. Wood's direct appeal, the Arizona Supreme Court refused to consider the mitigating evidence of Mr. Wood's biopsychosocial

history. It explained that:

> Defendant claims as a mitigating factor that he was reared in a dysfunctional family. Nothing in the record substantiates this claim, however, other than his father's alcoholism and his family's periodic moves due to military transfers. Defendant failed, moreover, to demonstrate how his allegedly poor upbringing related in any way to the murders. *See* *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied,* 494 U.S. 1047, 110 S.Ct. 1513, 108 L.Ed.2d 649 (1990).

State v. Wood, 180 Ariz. 53, 72, 881 P.2d 1158, 1177 (1994). Further, the Court summarized all of Mr. Wood's mitigation by stating that "[a]fter review of the entire record, we conclude there are no statutory and no substantial, nonstatutory mitigating factors. *Taken in isolation*, Defendant's substance abuse and alleged impulsive personality are not sufficiently substantial to call for leniency." *Id* (emphasis added). In failing to recognize that social history is indeed significant and important mitigation even when not causally connected to the crime, the Arizona Supreme Court committed its oft-repeated error of violating the Eighth Amendment.

As explained below, that finding was consistent with the Arizona courts' longstanding law barring a capital sentencer from giving effect to proffered mitigating evidence unless the defendant established a "causal nexus" between the mitigation and his actions at the time of the crime. *Lambright v. Schriro*, 490 F.

3d 1103 (9th Cir. 2007); *see, e.g.*, *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097 (1994); *State v. Trostle*, 191 Ariz. 4 (1997). For at least two decades, Arizona required that evidence of mental illness, childhood abuse and neglect, and other types of proffered mitigation have an explanatory or causal nexus to the crime before it will be deemed relevant for consideration in the weighing and balancing of mitigation against aggravation. These relevancy limitations violate federal law. *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562 (2004) (reversing requirement that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered); *Smith v. Texas,* 543 U.S. 37, 45, 125 S.Ct. 40 (2004). In *Smith*, the Court explained the rule that "the petitioner's evidence [regarding his troubled childhood and limited mental abilities] was relevant for mitigation purposes is plain under [its] precedents." *Id.* The Court cited *Eddings v. Oklahoma*, 455 U.S. 104,110 (1982), as precedent for its holding and characterized the "nexus" test as "a test we never countenanced and now have unequivocally rejected." *Id.* Thus, "a state cannot bar" consideration of evidence that "could reasonably [be found to] 'warrant[] a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 284-285 (2004).

The Eighth and Fourteenth Amendments require that a "sentencer, in all but

the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586,604 (1978)(emphasis in original); *see Eddings v. Oklahoma*, 455 U.S. 104,110 (1982)(same); *Skipper v. South Carolina*, 476 U.S. 1,4 (1986)(same). Even if particular mitigating evidence does "not relate specifically to...[the defendant's] culpability for the crime he committed," the defendant is constitutionally entitled to offer such evidence because it might "serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S., pp.4-5 (quoting *Lockett*,438 U.S., p.604). "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration." *Eddings*, 455 U.S., pp,115-116.

But in Mr. Wood's capital sentencing and appeal, the Supreme Court explicitly followed its rule which precluded consideration of relevant mitigation unless the defendant had proven a causal nexus between the mitigation offered and the offense. *See,e.g., State v. Stanley,* 167 Ariz. 519, 809 P.2d 944 (1991). The Court failed to consider the evidence of Mr. Wood's childhood abuse and trauma, his traumatic brain injuries, his serious mental illness, and his low IQ and learning disability. The Court first erroneously concluded that Mr. Wood's social history

mitigation consisted only of a claim of "dysfunctional family" based on his father's alcoholism and the family's frequent moves. *State v. Wood*, 180 Ariz. at 72, 881 P.2d at 1177. This was blatantly contradicted by the record. The evidence demonstrated significant social history mitigation, including that Mr. Wood's father was a violent man who physically and verbally abused his entire family, that Mr. Wood suffered numerous severe head injuries, that he has a low IQ and a learning disorder, and that he suffers from depression which led to suicide attempts. The Court explicitly stated that it would not consider any of this mitigation in any event because Mr. Wood "failed. . .to demonstrate how his allegedly poor upbringing related in any way to the murders." *Id.* Any of this information, and particularly all of it in combination, could have been sufficient to call for mercy. Instead, the Court excluded it from its consideration.[1]

State courts may assign the weight to be accorded mitigating evidence, but they "may not give it no weight by excluding such evidence from. . .consideration." *Eddings v. Oklahoma*, 455 U.S. at 113. The sentencer "must . . .

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[1]As explained below, Mr. Wood need not show prejudice resulting from this error because it is a structural one. Were he required to do so, however, relief would still be required because this is the type of mitigation which does matter in the minds of capital sentencers. *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 1516 (2000) (evidence of defendant's abusive childhood and mental health problems might influence sentencer's appraisal of defendant's moral culpability even though not causally connected to crime).

give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). The Arizona courts' failure to give effect to undisputed mitigating evidence supporting a sentence less than death requires Mr. Wood's death sentences be set aside.

Notwithstanding the United States Supreme Court's clear directives, the Arizona Supreme Court requires that before evidence of a mental illness may be considered relevant mitigation, a defendant must establish through expert testimony, that the mental illness has a causal nexus to the crime. "If the defendant fails to prove causation, the circumstance will not be considered mitigating. However, if the defendant proves the causal link, the court then will determine what, if any, weight to accord the circumstance in mitigation." *Hoskins*, 199 Ariz. 127, 151-152, 14 P.3d 997, 1021-1022 (2000). Although *Hoskins* post-dates the decision in *Wood*, in *Hoskins*, the Arizona Supreme Court relied on *State v. Wallace*, 160 Ariz. at 426-27, 773 P.2d at 985-86 (1989), a decision which pre-dates *Wood*, for the proposition that for mitigation to be considered and given weight "our jurisprudence requires the nexus [to the crime] be proven." *Id.*

The Arizona Supreme Court committed this error consistently over decades of reviewing capital sentences. *State v. Pandeli ("Pandeli I")*, 200 Ariz. 365, 379, 26 P.3d 1136, 1150 (2001) (holding that the appellant, despite his "proven

developmental history, family background, and mental and emotional condition, . . . failed under the preponderance standard to prove the existence of a causal nexus and, consequently, failed to establish this non-statutory mitigator"), *vacated on other grounds*, 536 U.S. 953 (2002); *State v. Hoskins*, 199 Ariz. 127, 151, 14 P.3d 997, 1021 (2000) ("reaffirm[ing] th[e] doctrine" that a defendant's dysfunctional background "can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts."); *State v. Jones*, 197 Ariz. 290, 4 P.3d 345, 368 (2000) (holding that the trial court properly gave the appellant's difficult family background no mitigating weight where no causal connection existed between his background and his criminal acts); *State v. Martinez*, 196 Ariz. 451, 465, 999 P.2d 795, 809 (2000) (concluding that because there was "simply no nexus between [the appellant's] family history and his actions, . . . [his] family history, though regrettable, is not entitled to weight as a non-statutory mitigating factor"); *State v. Kayer*, 194 Ariz. 423, 438, 984 P.2d 31, 46 (1999) (concluding that appellant, by failing to show "the requisite causal nexus that mental impairment affected his judgment or his actions," had not established impairment as a nonstatutory mitigating factor); *State v. Sharp*, 193 Ariz. 414, 425, 973 P.2d 1171, 1182 (1999) (holding that in light of appellant's failure to show "causal connection between his unfortunate childhood or his abuse

of drugs and alcohol and his criminal actions, sympathy for those events does not justify allowing him to receive diminished punishment"); *State v. Doerr*, 193 Ariz. 56, 70-71, 969 P.2d 1168, 1182-83 (1998) (affirming trial court's rejection of low IQ as mitigating factor because "[t]he record demonstrates no connection between the defendant's intelligence level and the murder"); *State v. Greene*, 192 Ariz. 431, 442, 967 P.2d 106, 117 (1998) (rejecting the appellant's claim of dysfunctional family history as a mitigating circumstance with the explanation that, "[appellant's] mother may have introduced him to drugs, but [appellant] failed to show how this influenced his behavior on the night of the murder"); *State v. Djerf*, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998) (concluding that evidence of the appellant's difficult family background would not mitigate the sentences imposed where the trial court found the evidence "irrelevant" "because proof was lacking that the appellant's family background had any effect on the crimes"); *State v. Rienhardt*, 190 Ariz. 579, 592, 951 P.2d 454, 467 (1997) (rejecting "past drug and alcohol use as a mitigating circumstance calling for leniency . . . [where the appellant] declined to present any evidence of a causal connection); *State v. Lee*, 189 Ariz. 590, 607, 944 P.2d 1204, 1221 (1997) (noting that appellant "failed to establish a nexus between his deprived childhood and his crimes"); *State v. Henry*, 189 Ariz. 542, 552-53, 944 P.2d 57, 67-68 (1997)

(holding that substance-abuse history "would provide no additional mitigation without evidence of a causal connection to the crime"); *State v. Jones*, 185 Ariz. 471, 492, 917 P.2d 200, 221 (1996) (declining to give the appellant's alleged mental illness mitigating weight where the appellant failed to establish a causal connection between his alleged mental illness and his criminal conduct); *State v. Murray*, 184 Ariz. 9, 13, 906 P.2d 542, 573, 577 (1995) (finding any evidence of difficult family backgrounds non-mitigating where neither coappellant had shown "that something in . . . [his] background impacted his behavior in a way beyond his control"); *State v. Walden*, 183 Ariz. 595, 620, 905 P.2d 974, 999 (1995), *overruled on other grounds sub nom. by State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996) (holding that the appellant's difficult family background was not a mitigating circumstance where the appellant had "not explain[ed] how this had anything at all to do with [his crimes]"); *State v. Bolton*, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995) (holding that "difficult family background is a relevant mitigating circumstance if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's control"); *State v. Ross*, 180 Ariz. 598, 607, 886 P.2d 1354, 1363 (1994) (holding that the appellant's difficult family background was not a mitigating circumstance where the appellant had failed to "show that something in

that background had an effect or impact on his behavior that was beyond his control"); *State v. Bible*, 175 Ariz. 549, 606, 858 P.2d 1152, 1209 (1993) (finding no basis for mitigation where "evidence addressing historical familial abuse was marginal and equivocal as to its causal connection with the murder"); *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992) (reviewing non-statutory mitigating evidence but rejecting the evidence because it "establishes only that a personality disorder exists. It does not prove that, at the time of the crime, the disorder controlled defendant's conduct or impaired his mental capacity to such a degree that leniency is required"); *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989) (same); *State v. Zaragoza*, 135 Ariz. 63, 70, 659 P.2d 22, 29 (1983) (finding evidence that defendant was an alcoholic not mitigating because it did not significantly impair defendant's ability to appreciate or conform conduct); *State v. Britson*, 130 Ariz. 380, 388, 636 P.2d 628, 636 (1981) (same). If there were any doubt left in light of these decisions, the Arizona Supreme Court put its unambiguous stamp on the rule: "If the defendant fails to prove causation, the circumstance *will not be considered mitigating*. However, if the defendant proves the causal link, the court then will determine what, *if any*, weight to accord the circumstance in mitigation." *Hoskins*, 199 Ariz. at 152 (emphasis added); *see, also*, *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008)("[i]n applying this type

of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating evidence, the Arizona Supreme court appears to have imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body"); *Williams v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010)("By holding that 'drug use cannot be a mitigating circumstance of any kind' unless Williams demonstrated 'some impairment at the time of the offense,' the Arizona Supreme Court imposed a 'nexus' requirement contrary to *Eddings*, *Lockett*, *Tennard*, and *Smith*.").

This error by the Supreme Court requires relief because it is a structural error. The United States Supreme Court has defined structural error as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). These defects "defy analysis by 'harmless-error' standards" because "[w]ithout these basic protections, a criminal trial cannot reliably serve its function . . . and no criminal punishment may be regarded as fundamentally fair." *Id.* at 309-10 (citation omitted). The Supreme Court has also explained that, when the consequences of the constitutional error "are necessarily unquantifiable and indeterminate," the error "unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). When a law, whether by an act of the

state legislature or judicial precedent, precludes the sentencing authority from giving meaningful consideration and effect to relevant mitigating evidence, the capital sentencing process is fundamentally flawed and cannot reliably serve its function. Such error is structural and, therefore, cannot be cured by a reviewing court; the determination of the appropriate sentence must be reconsidered by the state courts.

The Supreme Court has held that consideration of "any relevant mitigating evidence regarding [a defendant's] character or record and any of the circumstances of the offense" "is a constitutionally indispensable part of the process of inflicting the penalty of death." *California v. Brown*, 479 U.S. 538, 541 (1987) (citations and internal quotation marks omitted). The principle that any relevant mitigating evidence may be considered by the sentencer is rooted in the requirement that a defendant facing a death sentence receive an individualized sentencing. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality) (rejecting mandatory death sentences because the Eighth Amendment "requires consideration of the character and the record of the individual offender"). The predicate for the Court's reasoning is that "[d]eath, in its finality, differs more from life imprisonment[,]" and that difference results in the "need for reliability in the determination that death is the appropriate punishment in a

specific case." *Id.,* at 305. "The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett*, 438 U.S. at 605. When a state court has as a matter of law prevented the sentencing authority from giving meaningful consideration and effect to relevant mitigating evidence, the error must be structural. As explained, the process itself is fundamentally flawed. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) (holding that when the sentencer is "not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence" then "the sentencing process is fatally flawed").

While this, in and of itself, is sufficient to demonstrate structural error, the reviewing court's inability to quantify that error further supports why harmless-error review is inappropriate. "Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime." *Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., concurring in part and in the judgment). This moral evaluation must be conducted by the state sentencing authority authorized to impose a death sentence. The basic principles of Eighth Amendment jurisprudence leave no room

for reviewing courts to undertake harmless-error review, which necessarily requires a court to decide whether a sentencer would have had a different "reasoned moral response" if it were permitted to meaningfully consider and give full effect to previously unconsidered mitigating evidence.

In addition, the fact that an *Eddings* error is structural is evidenced by the Supreme Court's precedent. The Court has never undertaken harmless-error review when concluding that the sentencer was prohibited from considering relevant mitigating evidence. Beginning with *Lockett*, and continuing four years later in *Eddings*, the Supreme Court has reversed and remanded cases without analyzing for harmlessness where the sentencer was precluded from considering and giving effect to relevant mitigating evidence. In both *Lockett* and *Eddings*, once the Court determined that the sentencer had been precluded from considering relevant mitigating factors, it summarily reversed the death sentence and remanded for further proceedings. *Lockett*, 438 U.S. at 608-09; *Eddings*, 455 U.S. at 117. The reason for the reversal and remand, as Justice O'Connor explained, is "[b]ecause the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett* . . .." *Eddings*, 455 U.S. at 117, n.* (O'Connor, J., concurring). Several years later, the Supreme Court adopted Justice O'Connor's language and unequivocally stated

that any constitutional limitation on the consideration of relevant mitigating evidence requires a remand for resentencing:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*; *Hitchcock v. Dugger*; by the sentencing court, *Eddings v. Oklahoma*; or by an evidentiary ruling, *Skipper v. South Carolina*. . . . Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing."

Mills v. Maryland, 486 U.S. 367, 375 (1988) (citations omitted) (quoting *Eddings*, 455 U.S. at 117, n.* (O'Connor, J., concurring)); *see also McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (same). And beginning in 1989, in *Penry v. Lynaugh*, the Supreme Court has continued to reverse and remand Texas capital cases—either from direct review or habeas proceedings—without any assessment of harmlessness when it has determined that the state courts imposed an unconstitutional restraint on relevant mitigating evidence.[2] This Court should

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[2] *See Abdul-Kabir*, 550 U.S. at 264 (reversing denial of habeas relief without harmless-error review where state court restricted consideration of relevant mitigating evidence, and remanding for further proceedings); *Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) (reversing decision of Texas Court of Criminal Appeals after determining trial court's instructions prevented jurors from giving meaningful consideration to relevant mitigating evidence); *Tennard*, 542 U.S. at 289 (rejecting causal-nexus requirement on mitigating evidence as unconstitutional, and remanding without harmless-error instruction to Fifth Circuit for further consideration); *Smith v. Texas*, 543 U.S. 37, 49 (2004) (per curiam)

follow Supreme Court precedent and hold that the Arizona Supreme Court's error was structural and requires a new sentencing proceeding.

Even if Mr. Wood were required to show prejudice, such a showing exists here. The opinion affirming his direct appeal discounts significant mitigating evidence, including physical abuse by his parents, traumatic brain injury, low IQ, and learning disability. All of this evidence was not considered because it was unconnected to the crimes. This is precisely the type of evidence, however, that was reasonably likely to have elicited a morally-reasoned response for life in at least one juror. *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 1516 (2000) (evidence of defendant's abusive childhood and mental health problems might influence sentencer's appraisal of defendant's moral culpability even though not causally connected to crime); *Lambright v. Schriro*, 490 F.3d at 1115 ("disadvantaged background, emotional and mental problems, and adverse history. . .might cause a sentencer to determine that a life sentence, rather than a death at the hands of the state, is the appropriate punishment for the particular defendant");

(reversing decision of Texas Court of Criminal Appeals where causal nexus test imposed, and remanding for further consideration by state court); *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (reversing denial of habeas relief after finding state imposed unconstitutional restraint on consideration of mitigating evidence; remanding to Fifth Circuit); *Penry*, 492 U.S. at 328 (finding violation of *Eddings*/*Lockett* "compels a remand for resentencing").

State v. Pandeli, 204 Ariz. 569, 572, 65 P.3d 950, 953 (2003)("A different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency'"). When jurors bring their moral reasoning to bear on the question of life and death, the human frailties of the defendant before them can, and do, fuel expressions of mercy. Mr. Wood's life history, ignored and rejected by the Arizona Supreme Court, absolutely could have made the difference between life and death. He is entitled to a new sentencing hearing that complies with the Eighth and Fourteenth Amendments.

B. *This claim is excepted from preclusion.*

Mr. Wood has not previously presented this claim in any court. This Court may proceed to address the merits of the claim, however, because it meets two exceptions to Arizona's preclusion rule. Ariz.R.Crim.P. 32.2. This claim is both of sufficient constitutional magnitude to evade preclusion and represents a significant change in the law.

First, a claim presented in a successive petition for postconviction relief is not subject to preclusion if it "is of sufficient constitutional magnitude" and the State cannot show that the defendant "'knowingly, voluntarily and intelligently' waived the claim." *Id*., Comment. This assessment "depends merely upon the

particular right alleged to have been violated." *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Arizona has previously included in that category of claims those which assert rights "that can only be waived by a defendant personally." *State v. Swoopes*, 216 Ariz. 390, 399, 166 P.3d 945, 954 (App.Div.2 2007). In other words, rights which require a personal waiver initially may only be precluded if waived personally by the defendant on appeal or in postconviction. Here, Mr. Wood is asserting a right of an even higher dimension: one of such constitutional importance that it cannot be waived at all. That is, the right to Arizona Supreme Court review of a capital sentence.

The Arizona Supreme Court has explicitly anchored the parameters of its independent review in the requirements of the United States Constitution. *State v. Watson,* 129 Ariz. 60, 63-64, 628 P.2d 943, 946-947 (explaining the scope and rationale for independent death penalty review with extensive reference to the guidelines of the United States Constitution for capital cases as set forth in *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932 (1976) and *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764 (1980)). Notably, *Gregg* and *Godfrey* impose a federal constitutional duty upon a state to prevent "arbitrary and capricious" impositions of the death penalty. *Id.* Reiterating the federal constitutional aspect of its independent death penalty review in *State v. Brewer*,

170 Ariz. 486, 826 P.2d 783 (1992), the Court explained the importance of its review (even where the defendant had refused to file an appellate brief) by noting that "the eighth and fourteenth amendments prohibit all sentencing procedures creating a substantial risk that the death penalty is inflicted in an arbitrary and capricious manner." *Id.*, 170 Ariz. at 493-494, 826 Ariz. at 790-91.

As *Brewer* demonstrates, the right to the Court's mandatory review cannot be waived under any circumstances. *Id.* Nor could a defendant, at the time of Mr. Wood's appeal, waive the Court's independent review of his mitigation. *State v. Tankersley*, 191 Ariz. 359, 371, 956 P.2d 486, 498 (1998), *overruled on other grounds by State v. Machado*, 226 Ariz. 281, 246 P.3d 632 (2011) (Court required to conduct independent review even though no sentencing issues raised); *State v. Rogovich*, 188 Ariz. 38, 43, 932 P.2d 794, 799 (1997) (same, despite defense counsel's avowal that "a careful study of the record produced no arguable issues"); *State v. Hurles*, 185 Ariz. 199, 207, 914 P.2d 1291, 1299 (1996) (conducting independent review although no sentencing issues raised); *State v. Gerlaugh*, 135 Ariz. 89, 89, 659 P.2d 642, 642 (1983) ("None of the issues raised by counsel on appeal concerned the penalty imposed but we, nevertheless, have an obligation to examine the aggravating and mitigating circumstances to determine if the evidence supports the imposition of the death penalty.").

Thus, this right is on a higher plane than even one, such as the right to a jury trial, which may only be waived by a defendant personally. The right to the Court's independent review cannot be waived by a defendant or his counsel under any circumstance. As such, claims that this review was not conducted in a constitutional manner (in essence, not conducted at all) are not subject to preclusion in any case, much less in this case where Mr. Wood has not personally waived it in a knowing, voluntary and intelligent manner. To give such a right less consideration than a right which a criminal defendant is entitled to waive is illogical. There is no basis for treating an unwaivable right as more waivable than a personally-waivable right. This Court should consider Mr. Wood's claim on the merits.

Second, this claim is not precluded because it arises from a significant change in the law. Ariz.R.Crim.P. 32.1(g); 32.2(b). The Arizona Supreme Court has held that "if this court or a federal court changes the law in a way that would probably benefit defendant, he can claim the benefit of the new rule without preclusion. See Ariz.R.Crim.P. 32.1(g), 32.2(b)." *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995). As demonstrated in the discussion of the merits above, the Arizona Supreme Court committed the *Eddings* error in multiple capital direct appeals from at least 1981 to 2001. It was not until 2005 that the Court recognized

for the first time that "a jury cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal nexus' to a defendant's crimes." *State v. Anderson*, 111 P.3d 369 (Ariz. 2005) (citing *Tennard*, 542 U.S. at 282-87).[3] It was not until *Anderson* that the Court recognized Arizona law must be changed. Because Mr. Wood's previous state postconviction proceedings ended in May, 2004, Arizona law at the time did not support the claim raised here. Now, however, *Anderson* has changed the law such that Mr. Wood is entitled to relief.[4]

Mr. Wood could not have been expected to raise this claim in his prior state proceedings. "A [postconviction] defendant is not expected to anticipate significant future changes of the law. . .. Nor should PCR rules encourage defendants to raise a litany of claims clearly foreclosed by existing law in the faint hope that an appellate court will embrace one of those theories." *State v. Shrum*, 220 Ariz. 115, 118, ¶ 14, 203 P.3d 1175, 1178 (2009). As explained, because the

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[3]The Court continues, however, to maintain that it did not violate this very rule throughout its earlier decisions. *State v. Styers*, 227 Ariz. 186, 191, 254 P.3d 1132, 1137 (2011) (Hurwitz, J., dissenting) (echoing majority's complaints about "what we believe to be an erroneous decision by the Ninth Circuit" in granting relief for causal connection violation).

[4]Even if the change in the law as defined as occurring in *Tennard*, Mr. Wood could not have addressed it in his prior state postconviction petitions. *Tennard* was decided in June, 2004.

Arizona Supreme Court had followed the rule for at least twenty years that certain types of mitigation must be causally connected to the crime to be considered, and has to date still not conceded that this rule violated *Eddings*, no capital defendant would have prevailed had it been raised. Further, "a 'change in the law' requires some transformative event, a 'clear break' from the past." *Id*., at ¶ 15, 203 P.3d at 1178, *quoting State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991) (internal quotation marks omitted). That clear break occurred in *Anderson*, decided after Mr. Wood's last state postconviction proceeding concluded.

Even if the requisite transformative event has not yet taken place, it is poised to transpire in the near future. The Ninth Circuit Court of Appeals is prepared to address this very error, including whether it is subject to harmless error review. It has granted *en banc* review in *McKinney v. Ryan*, No. 09-99018 (9th Cir.), and oral argument is scheduled for the week of September 15, 2014. Should the petitioner prevail in that case, the causal connection rule established by the Arizona Supreme Court, and followed in its review of Mr. Wood's capital sentences, will be overturned. At that point, preclusion of this claim will be fundamentally unfair under Rule 32.1(g) and a new sentencing hearing will be required. At minimum, this Court should request the Arizona Supreme Court delay issuance of a warrant of execution until the Ninth Circuit has ruled in

McKinney. That will allow this Court to preserve its jurisdiction over Mr. Wood and his claim and ensure the petition is not rendered moot by Mr. Wood's execution in the interim.

III. MR. WOOD WAS DENIED CONFLICT-FREE COUNSEL IN HIS DIRECT APPEAL.

A. *The relief granted by the Arizona Supreme Court must be enforced.*

The Sixth Amendment guarantees that the criminally accused shall have the right to assistance of counsel for his defense. U.S.Const.Amend.VI. Where a state provides a direct criminal appeal as of right, the due process clause of the Fourteenth Amendment guarantees a defendant effective assistance of counsel on his first such appeal. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985).

That guarantee includes two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1251 (9th Cir. 1989), citing *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *see also, Bonin v. Calderon*, 59 F.3d 815, 825 (9th Cir 1995). A sufficiently significant conflict of interest prevents an attorney from providing the effective assistance of counsel contemplated by the Sixth Amendment. *See Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 1697 (1988); *Duncan v. Alabama* , 881 F.2d 1013, 1016 (11th Cir.1989).

To prevail on a claim of ineffective assistance of counsel based upon a conflict of interest, a petitioner must demonstrate that there was an "actual conflict of interest that adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 466 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L Ed.2d 333 (1980). Under such circumstances, Petitioner need not prove prejudice. *United States v. Miskinis*, 966 F. 2d 1263, 1268 (9th Cir.1992), citing *Cuyler v. Sullivan*, 466 U.S. 335, 350, 100 S.Ct. 1708, 1719 (1980). Rather, prejudice is presumed because it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir.1988), *citing Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984). Accordingly, Mr. Wood need only show that the conflict caused "some effect on counsel's handling of particular aspects of the trial." *Miskinis, supra*, 966 F.2d at 1268, citing *Mannhalt v. Reed*, 847 F.2d 576, 583 (9th Cir.1988).

The above standards have been applied in cases of successive representation. Cases of successive representation present the danger of betraying both the duty of preserving client confidences and the duty to exercise independent professional judgment on behalf of a client. Hence, anytime there is a substantial connection between two representations, the danger of a conflict arises

and counsel should be disqualified. "Substantiality is present if the factual contexts of the two representations are similar or related." *Trone v. Smith*, 621 F.2d 994,998 (9th Cir.1980). *See also Fitzpatrick, supra*, 869 F.2d at 1252 ("In successive representation, 'conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties.").

In this case, a conflict of interest arose when appellate counsel Baker Sipe, while still in the briefing stage of his representation of Mr. Wood, accepted a job at the Pima County Legal Defender's Office. That same office was counsel for Debra Dietz and the office had previously withdrawn from representing Mr. Wood on that basis. Ex. D. As a result, appellate counsel failed to assert trial and mitigation claims which would have required him to discredit Debra Dietz. He did so because, as a member of the Legal Defender's Office, he owed the same duty of loyalty and confidentiality as if he personally had represented Ms. Dietz.

Trial counsel presented a defense of impulsivity. This defense to premeditation was consistent with the facts of the crime and the lay and expert testimony. It relied in large part on the theory that Debra Dietz's behavior toward Mr. Wood triggered the character trait of impulsivity which led to the crimes. Her repeated reversals in the decision to end and re-initiate the relationship were

extraordinarily stressful to Mr. Wood. When he was confronted with being cut off from her for the final time, after being led by Ms. Dietz to believe that they would reunite, his impulse control was overcome and he shot and killed Ms. Dietz and her father.

Arguing that defense, however, required counsel to criticize Ms. Dietz, and when new, conflicted counsel was appointed for the appeal, he instead chose to argue that Mr. Wood was insane at the time of the shootings. *State v. Wood*, No. CR-91-0233-AP Opening Brief, p. 43 (Ariz.Sup.Ct.). This tactic took the focus of the defense case off of Ms. Dietz and shined the spotlight solely on Mr. Wood. Unfortunately, no evidence or testimony supported the position that Mr. Wood was insane at the time of the shootings, so there was no strategic basis to support the decision to abandon the impulsivity argument. Appellate counsel's shift in theory was based entirely on a desire to avoid criticizing Ms. Dietz and it had an adverse effect on the quality of the appeal. For this reason, appellate counsel abandoned his obligation to advocate for Mr. Wood with undivided loyalty as required under the Sixth Amendment.

This Court need not determine whether there was a conflict of interest and whether that conflict required appellate counsel to withdraw. That has already been decided. Ex. F. Instead, this Court must grant the relief required by that

order which has thus far been denied to Mr. Wood. This matter should be returned to the Arizona Supreme Court for a new direct appeal in which Mr. Wood is finally represented by unconflicted counsel.

B. *This claim is not subject to preclusion.*

As explained *supra*, Section II.B., this claim is not subject to preclusion because Mr. Wood is asserting a right of sufficient constitutional magnitude. The right to unconflicted counsel may only be waived by the defendant personally. *Lockhart v. Terhune*, 250 F.3d 1223, 1232–33 (9th Cir.2001) (explaining that, for a defendant to "knowingly and intelligently" waive his right to conflict-free counsel, he must be informed "of the specific ramifications of his waiver"); *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir. 1998)("Trial courts may allow an attorney to proceed despite a conflict 'if the defendant makes a voluntary, knowing, and intelligent waiver.'"), *quoting Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994); *State v. Jenkins*, 148 Ariz. 463, 465, 715 P.2d 716, 718 (1986) (noting absence of defendant's "knowing waiver of the conflict of interest. . .as required by *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). As a result, it is of sufficient constitutional magnitude to be exempted from preclusion. Mr. Wood has never made a personal waiver of this claim. On the contrary, he insisted to conflicted counsel that he would not waive it. Ex. E.

Moreover, this Court need not decide the issue of preclusion because Mr. Wood is not raising a new claim here. He is asking for enforcement of the order already entered by the Supreme Court. He previously prevailed on the motion for new appellate counsel based on the conflict of interest and has never waived his right to be represented by unconflicted counsel. This Court should comply with the terms of the Supreme Court's order and appoint counsel for the direct appeal.

IV. REQUEST FOR AMENDMENT AND ADDITIONAL BRIEFING

Mr. Wood has diligently attempted to set forth in this petition all claims of constitutional violations currently available to him, and provide the facts supporting those claims. Mr. Wood requests permission to supplement and amend this petition, and the exhibits accompanying it, following the completion of the investigation into his case.

V. REQUEST FOR EVIDENTIARY HEARING

Ariz.R.Crim.P. 32.8(a) provides that a "defendant shall be entitled to a hearing to determine issues of material fact. . .." Mr. Wood requests an evidentiary hearing on each issue presented in this petition, and any subsequent amendment to this petition, in which there are issues of material fact. These issues will be identified in the reply briefing, following the state's opportunity to identify any factual disputes in its responsive briefing.

VI. CONCLUSION

The facts and claims presented in this petition establish substantial grounds which entitle Petitioner to immediate relief from his unconstitutional and unjust convictions and sentences. To prevent a grave miscarriage of justice, Petitioner requests that this Court grant that relief or, in the alternative, grant Petitioner a hearing at which he may present further evidence in support of his meritorious claims.

Respectfully submitted this 6th day of May, 2014.

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