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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 Reply to Response to Petition for Postconviction Relief **Execution Scheduled: July 23, 2014** Hon. D. Douglas Metcalf

The State's Response to the Petition for Postconviction Relief ("Resp.") makes several important concessions. First, the State correctly admits that Mr. Wood's claim under *Tennard v. Dretke*, 542 U.S. 274 (2004), and *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005), is not waived. Resp., at 13-14. Second, the State concedes, as it must, that Mr. Wood's direct appeal counsel labored under a conflict of interest. *Id.*, at 36. The State's remaining arguments

are unpersuasive. Mr. Wood's petition should be granted.

I. Mr. Wood's Claims Are Not Precluded.

As an introductory matter, the State complains about the time that elapsed between Mr. Wood's first postconviction proceeding (seventeen years), the conclusion of his federal habeas proceedings (eight months)[1], and the filing of the instant petition. Resp., at 3. The State fails to note that Mr. Wood has been in litigation in either state or federal court for all of those years, save several months in the past year. The only time during which litigation was not pending--the time period between the conclusion of cert proceedings and initiation of this matter--was also the time in which the state failed to request a warrant of execution, presumably because it could not comply with its own lethal injection protocol. The State does not explain how it was harmed by Mr. Wood's failure to litigate during a time period in which the State itself was unable to proceed.

A. *The* Anderson *claim could not have been raised previously.*

[1]Although the State claims Mr. Wood filed the instant petition eight months after the habeas proceedings concluded, this is factually inaccurate. The United States Supreme Court denied cert on October 7, 2013. The time for filing rehearing passed on November 1, 2013. The petition was filed on May 6, 2014, just over six months later. During that time, it was the State which failed to prosecute its case for execution. It failed to request a warrant of execution for months after the cert proceedings concluded, delaying that request until April 22, 2014. This is not to complain about the period of delay; but rather to say that there was no litigation from either side during that period so the State cannot reasonably be heard to

The State argues Mr. Wood should have presented a reason for not raising his *Anderson/Tennard* claim in a previous petition or in what it believes is a timely manner. Resp., at 12. As explained in the petition, however, there has been no previous petition since the Arizona Supreme Court's decision in *Anderson*. Thus, this petition was his first opportunity in state court to raise this Eighth Amendment claim.

As to timeliness, the State argues Mr. Wood should have filed the instant petition after *Anderson* was decided in 2005. The State cites no rule, and we are aware of none, which requires a defendant to litigate simultaneously in state and federal court. Mr. Wood has been engaged in litigation in federal habeas proceedings since that time. While he could have chosen to litigate in state court during that period, no rule required him to do so. Indeed, simultaneous litigation is disfavored, for good reason. Concerns of comity and economy counsel against such a rule. *Bunch v. Nationwide Mut. Ins. Co.*, 321 P.3d 266, 273 (Wash.App. Div.1 2014) ("But if two courts are simultaneously considering the same issue. . .there is a risk of the two courts arriving at inconsistent results. This would also be a waste of judicial resources."); *see e.g., State v. Williams*, No. CR15716 Minute Entry Action (Pinal Cty.Super.Ct. Feb. 22, 2002) (unpublished) (dismissing

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attribute this delay to Mr. Wood.

postconviction notice in capital case based on pending federal habeas litigation), Ex. J, attached.

B. *The conflict claim is not untimely or successive.*

The State similarly argues Mr. Wood could have raised his conflict of interest claim in each of his prior postconviction proceedings. Even if some rule required Mr. Wood to bring the conflict of interest claim back to state court while federal proceedings were pending, he attempted to do exactly that. Mr. Wood moved to dismiss any unexhausted claims (of which the conflict claim was found to be one) from his federal habeas petition and stay those proceedings, to allow him to litigate the claims in state court. *Wood v. Ryan*, No. 98-cv-00053 Supplemental Motion to Dismiss Unexhausted Claims (D.Ariz. March 26, 2001). That motion was denied, *at the State's urging*. *Id*, Dkt. 53 and 54. The State should not be allowed to benefit now from preventing Mr. Wood from raising his claim in state court, given that it prevented Mr. Wood from doing just that thirteen years ago.

C. *Both claims are of sufficient constitutional magnitude.*

The State's arguments regarding untimeliness and preclusion for failure to raise claims previously are ultimately irrelevant because, as explained in the petition, both claims are of sufficient constitutional magnitude to excuse the failure

to raise them previously. The State fails to address these arguments at all and this Court should proceed to address both claims on their merits.

The State attempts to avoid the sufficient constitutional magnitude exception by summarily stating that it does not apply because the State is not "assert[ing] a claim is precluded under Rule 32.2(a)(3) because it has 'been waived at trial, on appeal, or in any previous collateral proceeding.'" Resp., at 13, *quoting* Comment to Ariz.R.Crim.P. 32.2(a)(3). But that is precisely what the State is arguing when it asserts the claims should have been raised previously. Although it is not entirely clear, the State appears to assert that the sufficient constitutional magnitude exception applies only to successive claims, not those which it claims are untimely. The State is attempting to create a new preclusion rule, based simply on the passage of time, which is not subject to the exception at all. Resp., at 13-14. But there is no such additional rule in Arizona. There are no unwritten, informal preclusion rules and this Court should not create one now.

The State argues Rule 32.2(a)(3) and 32.2(b) as two different preclusion rules and concludes the sufficient constitutional magnitude exception only applies to the first. Resp., at 13-14. But there are not two different preclusion rules. Rule 32.1 sets out the preclusion rule and Rule 32.2 sets out the exceptions. The cases cited by the State bear out this point. *State v. Shrum*, 220 Ariz. 115, 203 P.3d 1175

(2009); *State v. Harden*, 228 Ariz. 131, 263 P.3d 680 (App. 2011). *Shrum* is not, as the State portrays it, decided based on lack of timeliness. Rather, it is based on successiveness. The Arizona Supreme Court found a claim precluded because it was not raised in a first state postconviction petition; not because it was not raised within a specified period of time.[2] *Harden* is based on untimeliness of a first postconviction petition; not at issue here. Neither holding is remarkable and neither supports the State's contention that there is a distinct timeliness bar for successive petitions.

The State's interpretation of Arizona's postconviction timeliness rule is fundamentally flawed. Rule 32.2(b) requires an explanation for a claim raised in a postconviction relief proceeding that is "successive or untimely." Notably, it is postconviction proceedings that are timely or successive, not claims. The State's response attempts to extend the timeliness requirement to any period of time that elapses before successive litigation is initiated. But the only timeliness rules Arizona has enacted are in Rule 32.4(a) and (c). Rule 32.4(a) sets forth the timeliness requirement for filing a notice of postconviction relief:

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[2]The fallacy of the State's argument that a passage of time can be the basis for precluding a postconviction petition is demonstrated by the fact that the State cannot identify what the relevant period of time would be. The State has cited no rule or statute that sets forth a time limit for filing successive petitions because there is none. This Court should refuse to establish one here.

> A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred.. . .In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.

Ariz.R.Crim.P. 32.4(a). In capital cases, the notice of postconviction relief is filed by the Arizona Supreme Court. *Id.* Thus, all initial capital postconviction notices are timely. Rule 32.4(c) requires that petitions in a capital case be filed within a specified time after the notice is filed. Ariz.R.Crim.P. 32.4(c)(1). Mr. Wood's first postconviction counsel complied with the requirement. Thus, timeliness is not at issue here; successiveness is.

For the same reasons, the claims are not precluded as untimely under 32.4(a). That rule does not establish an additional ground for preclusion. It simply defines which notices and petitions are timely and which are not. In this case,

there is no question Mr. Wood's petition would not be timely under 32.4(a); but that is of no import because it is not a first petition. That is why 32.2(a)(3) and the sufficient constitutional magnitude exception are applicable instead. Under the State's interpretation–that the sufficient constitutional magnitude exception is available only for successive petitions and not untimely, successive petitions, the exception would cease to exist for all practical purposes, because it is extraordinarily unlikely a successive petition would ever be filed that was not also untimely. Because the State cites no authority for this novel proposition, this Court should not adopt it. *But see State v. Lopez*, 234 Ariz. 513, 323 P.3d 1164 (Ariz.App.2 2014); *State v. Lopez*, No. CR-14-0148-PR Pet.forRev. (Ariz.Sup.Ct. May 13, 2014).[3]

As explained, all of the State's arguments about when Mr. Wood could have raised these claims are irrelevant if the claims are of sufficient constitutional magnitude. The State provides no argument whatsoever that the claims raised in the petition are not of sufficient magnitude, thereby conceding these points. This

[3]If this Court believes it is bound by *Lopez*, it should urge the Arizona Supreme Court to accept review of the issue in this case and stay Mr. Wood's execution on that basis. *Lopez* represents a radical interpretation of the sufficient constitutional magnitude exception in a recently-decided case of first impression that will affect a large number of petitioners, both capital and non-capital. Because *Lopez* is presently pending on petition for review in the Supreme Court, it would be fundamentally unjust to preclude Mr. Wood's claims and execute him on the basis

Court should find the claims are excepted from preclusion and proceed to their merits.

II. Mr. Wood Is Entitled to Relief on His Claim that the Arizona Supreme Court Refused to Consider Important Mitigation.

The State's response maintains that the Arizona Supreme Court followed the law established by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), from the time of those decisions. The cases set forth in the petition, however, demonstrate this was not the case. The State does not address any of the two dozen cases cited in the petition, pp. 9-15, and instead creates its own version of the Arizona Supreme Court's history. First, the State points out that Arizona amended its capital sentencing statute to conform to *Lockett* by adding a catch-all statutory mitigating factor. Resp., at 21. But Mr. Wood does not claim that the statute violated *Lockett* and *Eddings*. Rather, the Arizona Supreme Court's failure to apply Eighth Amendment precedent from the United States Supreme Court did so. The State then concludes that "the Arizona Supreme Court has faithfully complied with *Eddings*' holding by requiring consideration of all relevant proffered mitigation in capital sentencing." Resp., at 22, *citing State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995); *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982); *State v. McMurtrey* 136

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of that decision before the high court has an opportunity to consider it.

Ariz. 93, 101-02, 664 P.2d 637, 645-46 (1983). This also does not address the problem Mr. Wood raised, which is that the Arizona Supreme Court defined most, if not all, social history mitigation as not relevant and, in that way, blocked it from consideration in the capital sentencing determination. So, while the Arizona Supreme Court endorsed the general principle that all relevant mitigating evidence must be considered, it negated that rule by simply defining some categories of mitigating evidence as not relevant. The State is able to cite language from a handful of cases, Resp., at 23, which is not facially inconsistent with *Lockett* and *Eddings*. This does not negate the fact that, prior to *State v. Anderson*, the Arizona Supreme Court categorically rejected social history and substance abuse mitigating evidence that was not causally connected to the crime. *See* Pet., at 9-15. For this reason, *Anderson* was a substantial turning point in Arizona capital jurisprudence because the Arizona Supreme Court disavowed its prior practice, which was applied in Mr. Wood's case. This is a "clear break from the past[.]" *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009). Despite the Arizona Supreme Court's, and the State's, insistence that it has never refused to consider this evidence and has only decided to give it minimal weight, the case law tells an entirely different story. *See* Pet. at 9-15.[4]

[4]The State is mistaken that *McKinney v. Ryan*, No. 09-99018 (9th Cir.), cannot

In defense against the merits of the *Anderson* claim, the State quotes the mitigation discussion contained in Mr. Wood's direct appeal opinion. Resp., at 26-30. The State then posits that there could be no *Anderson* violation because the Arizona Supreme Court "reviewed the entire record for mitigating circumstances." Resp., at 30, *citation omitted.* This did not prevent the Court from violating *Eddings* and *Lockett*, though, because it did not consider non-causally connected evidence mitigating at all. So the two rules are not, in the Arizona Supreme Court's mind, inconsistent with one another: it could review the entire record for mitigation and flatly refuse to meaningfully consider and give full effect to dysfunctional family background as mitigating evidence. In the eyes of the Eighth Amendment, though, this was not a constitutionally-sufficient proceeding.

The State's insistence that the Arizona Supreme Court meaningfully considered the dysfunctional family evidence is flatly contradicted by the Court's own language: "Defendant failed, moreover, to demonstrate how his allegedly poor upbringing related in any way to the murders." *State v. Wood*, 180 Ariz. 53, 70-72, 881 P.2d 1158, 1175-77 (1994). There is no question the Arizona Supreme Court was following its causal connection rule in violation of *Lockett* and *Eddings* here

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inform this Court's decision. Resp., at 24, n.8. The precise issue in this case is before the Court there. A grave miscarriage of justice would result if Mr. Wood were executed just shortly before other inmates in a procedural posture materially

for two reasons. First, immediately after the quoted statement, it cited *State v. Wallace*, which clearly engaged in the same unconstitutional preclusion of mitigating evidence. 160 Ariz. 424, 426-27, 773 P.2d 983, 985-86 (1989) (for mitigation to be considered and given weight "our jurisprudence requires the nexus [to the crime] be proven."). Secondly, the Court concluded by listing the only non-statutory mitigation it had given any weight: Mr. Wood's "substance abuse and alleged impulsive personality." *State v. Wood*, 180 Ariz. at 72, 881 P.2d at 1177. It did not include dysfunctional family in that list, demonstrating that it had not given full effect to that category of mitigation.

The State nevertheless claims the Court considered this mitigation because it was admitted by the trial court and mentioned in the independent review. Resp., at 31. But the Eighth Amendment requires meaningful consideration. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."); *Schriro v. Landrigan*, 550 U.S. 465, 486 (2007)("For a capital defendant, the right to have the sentencing

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the same as Mr. Wood are granted relief on the issue presented here.

authority give full consideration to mitigating evidence that might support a sentence other than death is of paramount importance."). Considering evidence just long enough to reject it in full as irrelevant is not meaningful consideration. The sentencer–the Arizona Supreme Court, in this case–must be able to appreciate the mitigative significance of the evidence and give it effect; not merely recognize that the evidence is before it. *See generally Abdul-Kabir*, *supra.*

The State further argues the Arizona Supreme Court actually rejected the dysfunctional family mitigation because it was not proven. Resp., at 32. This is also plainly contradicted by the record. The Court itself conceded there was evidence that Mr. Wood's father was an alcoholic. In itself, this is the type of evidence that might have made a difference at sentencing if properly considered because it may have moved a sentencer to life. The record also contained evidence, which the Court ignored in its decision, that Mr. Wood's father beat his son with a belt and was verbally abusive to the family when he drank. Pet., Ex. C, at 2. The Supreme Court's attempt to minimize the evidence of family dysfunction does not negate that it is precisely the type of evidence that a sentencer, when giving it full effect, may rely on in concluding that death is not the appropriate sentence. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003).

Because the Supreme Court failed to give meaningful consideration and full

effect to Mr. Wood's mitigating evidence based on its causal connection requirement, this Court should vacate the sentences of death and order a new sentencing proceeding.

III. Mr. Wood Is Entitled to the Direct Appeal Counsel He Was Denied Because of the Conflict of Interest.

Although conceding direct appeal counsel labored under a conflict of interest, the State reasons that the trial court's *in camera* review of the Legal Defender's Debra Dietz file solved the conflict created by that office's representation of Mr. Wood. Resp., at 35. The nature of the conflict, however, was that advocacy for Mr. Wood required counsel to disparage the victim and former client of the Legal Defender, Ms. Dietz. Providing the trial court access to Ms. Dietz's file did not address that issue. Even if the trial court's review could have been sufficient to allow Mr. Wood to waive the conflict, he never did so. The State suggests appellate counsel made the decision to not comply with the Arizona Supreme Court's order to withdraw. Resp., at 35. Appellate counsel, however, did not have the authority to waive the conflict. Mr. Wood was never given the opportunity to be advised by independent counsel regarding the waiver and, in fact, he never actually made a waiver. *See* Ariz.R.Prof.Conduct ER 1.7 (requiring informed consent and written waiver). Thus, there was an actual conflict which was not waived.

The State concedes Mr. Wood need not show prejudice from the conflict of interest, but rather only that a viable alternative strategy existed. Resp., at 35-36. As explained in the petition, there was such a strategy: Mr. Wood's character trait of impulsivity which was ignited by the constant push and pull of Debra Dietz. She gave him the illusion that their relationship was continuing at the same time as she enlisted her family and a restraining order to keep him away. This theory of the case, though, was only available to an attorney who did not owe a duty of loyalty to Ms. Dietz.

Under the law of the case, this theory was a viable one. The state and federal courts have already determined that trial counsel was not ineffective in pursuing it. *Wood v. Ryan*, 693 F.3d 1104, 1119 (9th Cir. 2012). He did not fall below a reasonable standard of competence in emphasizing Ms. Dietz's role in setting off Mr. Wood's character trait of impulsivity. *Id*; *State v. Wood*, No. CR-28449 Minute Entry, p. 6 (Pima Cty. Super.Ct. June 6, 1997) (finding trial counsel effective because, *inter alia*, failure to present alternative defense "did not fall below the level of professionally competent assistance" and because "evidence casting doubt on the nature of the victim's relationship with the defendant was introduced to the jury"). Because the strategy was viable, but unavailable to appellate counsel because of the conflict of interest, there was an adverse effect.

The State complains that the appellate attorney has not stated he "would have pursued an alternative strategy but for his office's duty of loyalty to Ms. Dietz." Resp., at 36. It is for this Court to determine whether the conflict had an adverse effect; not for the conflicted attorney to opine. Appellate counsel does affirm, however, that the argument that Ms. Dietz's "own behavior had been a factor in Mr. Wood's character trait of impulsivity and the resulting homicides" was not available to him because of the conflict. Ex. G, at ¶ 5. He further concedes that this may have been "persuasive" evidence on the only pivotal issues in the case. *Id.*[5]

The State nonetheless argues that it would not have mattered because there was no issue omitted on appeal that should have been raised. Resp., at 37. On the contrary, Mr. Wood's appellate counsel would have raised the issue of insufficiency of the evidence of premeditation and would have argued this evidence as mitigation. In these ways, unconflicted counsel would have presented

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[5]Appellate counsel also swears that he would not have intentionally waived the conflict issue and that he did not obtain Mr. Wood's waiver of it. *Id.*, at ¶ 6. Similarly, first postconviction counsel affirms that neither she nor Mr. Wood intended to waive the conflict claim. Ex. H, Declaration of Harriette Levitt. Finally, Mr. Wood's second postconviction counsel confirms that Mr. Wood did not personally waive the conflict claim at any time. Ex. I, Declaration of Peter Eckerstrom. These declarations establish that the claims raised in the petition have never been personally waived by Mr. Wood. Thus, the sufficient constitutional magnitude exception cannot be rejected.

a case for life–either by way of second-degree murder or a reduction to life sentences through independent review–for Mr. Wood in his direct appeal. Instead, appellate counsel argued insanity even though, as explained in the petition, no expert found Mr. Wood insane at the time of the crimes and there was no evidence to support such an opinion or argument. Pet., at 31; Ex. A-C. And, contrary to the State's contention that appellate counsel only indirectly focused on a non-existent insanity defense, the Opening Brief argues that defense in at least three distinct areas of claims. *State v. Wood*, No. CR-91-0233-AP Opening Brief, at 43, 47, 79-82. (Ariz.Sup.Ct. June 1, 1992). First, as the State points out, appellate counsel argued insanity in the context of defense counsel's failure to present an insanity defense to the jury through an expert. *Id.*, at 43. Then, appellate counsel argued counsel was ineffective in not supporting an insanity defense with hospital records and interviews of expert witnesses. *Id.*, at 47. Lastly, appellate counsel argued that Mr. Wood's insanity should preclude a sentence of death. *Id.*, at 79-82. There was thus significant and repeated reliance on the non-existent insanity theory in the Opening Brief, to the exclusion of the theory that the actions of one of the victims was a factor in Mr. Wood actions on the day of the crimes.

Because appellate counsel's conflict of interest interfered with the presentation of a viable alternative defense for Mr. Wood's life, and instead

substituted one unsupported by any facts in the case, this Court should vacate the convictions and sentences of death and order a new trial. In the alternative, this Court should appoint unconflicted counsel for a direct appeal which complies with the Sixth Amendment.

IV. Conclusion

Rule 32.4(f) provides that "no stay of execution shall be granted upon the filing of a successive petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues not precluded under Rule 32.2." Ariz.R.Crim.P. 32.4(f). Based on the arguments presented in the petition for postconviction relief and in this reply, this Court should find that Mr. Wood's claims are not precluded under Rule 32.2 so that Mr. Wood may request a stay of his execution, currently scheduled to be carried out on July 23, 2014, little more than two weeks from today. A stay will permit this Court to give full and fair consideration to the merits of the issues raised in the petition.

Respectfully submitted this 7th day of July, 2014.

for Julie S. Hall
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Attorney for Mr. Wood

Copy of the foregoing e-mailed
this 7th day of July, 2014, to:

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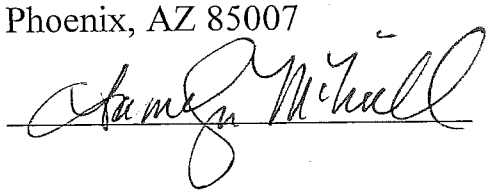


Exhibit G

I, Barry J Baker Sipe, declare under penalty of perjury, the following to be true to the best of my information and belief:

1. I am an attorney licensed to practice in Arizona, the Ninth Circuit Court of Appeals, and the United States Supreme Court. I have practiced law for thirty-seven years.

2. In July 1991, I was appointed by the Pima County Superior Court to represent Joseph Wood in his direct appeal from two first-degree murder convictions and death sentences and the related non-capital convictions and sentences. At that time, I was in private practice.

3. On April 6, 1992, I became employed by the Office of the Legal Defender in Pima County. When I started with the office, my supervisors made it clear that they wanted me to keep all of my murder cases to help the county's budget. The county did not want to pay private counsel to work on those cases. In one instance, Judge Meehan became upset with me for filing a motion to withdraw, telling me that he was not going to permit me to withdraw because I had already been paid $3,000 on the case. Although I do not recall now if this was in relation to Mr. Wood's case, I cannot think of another case in which it would have occurred. I have also reviewed my billing statement from that time period and it reflects that I had incurred $3,430 in fees on Mr. Wood's case when I left private practice.

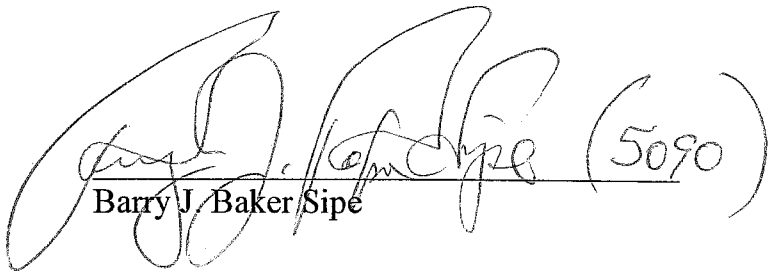
4. I do not remember being aware in the early 1990s of what might today be called a *Tennard* claim. That is, an Eighth Amendment challenge to the Arizona Supreme Court's rule that evidence not causally connected to the crime would not be considered mitigating in a capital case. I did not raise such a claim in my opening brief or cite *Eddings v. Oklahoma*, on which *Tennard* is based. If I had been aware of this argument, I would have raised it on Mr. Wood's behalf. I am sure I was not aware of this claim because I was shocked when the opinion was issued because the Arizona Supreme Court conducted a *de novo* review of the mitigating factors. Because I was unaware the Court would even conduct that review, I would not have known to raise an issue regarding the Court imposing improper barriers when conducting such review.

5. I met with Mr. Wood one time at the Arizona State Prison in Florence. He did not make any decisions about which claims to raise in the opening brief. He had little education and no legal training. I made all of the decisions regarding which claims to assert in his case. I raised every potentially-meritorious claim of which I was aware at the time. I did not drop any issues from the opening brief, for strategic or any other reasons. However, because the Legal Defender's Office had previously represented Ms. Dietz, I could not argue that her own behavior had been a factor in Mr. Wood's character trait of impulsivity and the resulting homicides. This evidence might have been persuasive to a fact-finder on the issues of premeditation or mitigation.

6. I do not have an independent recollection at this time of the circumstances surrounding my motion to withdraw, or the courts' rulings on it. I do not recall any conversation with Mr. Wood about the motion, and this is not the type of issue that I would have waived, particularly in a capital case. As far as I know, Mr. Wood never waived the conflict, nor did he receive advice from a non-conflicted attorney about whether to waive it. I never did a written waiver form, and I know Mr. Wood never made a written waiver.

I declare under penalty of perjury that the foregoing is true to the best of my information and belief.

Signed this 30th day of June, 2014.



Barry J. Baker Sipe

Exhibit H

I, Harriette P. Levitt, declare under penalty of perjury, the following to be true to the best of my information and belief:

1. I am an attorney licensed to practice in Arizona, the Ninth Circuit Court of Appeals, and the United States Supreme Court. I have practiced law since 1981 and have practiced criminal defense for most of that time.

2. In July 1995, I was appointed by the Pima County Superior Court to represent Joseph Wood in his Rule 32 proceedings on, among other convictions, two counts of first-degree murder for which he was sentenced to death. This was my first capital postconviction case. Two years earlier, I represented Mr. Wood's father on a misdemeanor domestic violence charge in Tucson City Court. That charge was not related to Mr. Wood's case, and it was dismissed. There was no potential conflict of interest when I was appointed on the capital case in 1995.

3. I do not remember being aware in the 1990s of a claim that the Arizona Supreme Court's treatment of certain types of mitigating evidence violated *Eddings v. Oklahoma* by requiring a causal connection between the evidence and the crime. I did not raise such a claim in my postconviction petition, or raise any claims challenging the Arizona Supreme Court's independent review of Mr. Wood's death sentences. If I had been aware of this argument, I would have raised it on Mr. Wood's behalf. Instead, I argued in my petition that Mr. Wood's mitigation *was* causally connected to the crimes.

4. I do not recall identifying appellate counsel's conflict of interest as a potential claim to include in the petition. If I had, I would have raised it.

5. I never met with Mr. Wood at the Arizona State Prison in Florence, but I do recall speaking to him on the telephone. It is my practice to always ask my clients about any issues they want to raise in their petition. Mr. Wood did not have anything to offer on that topic. I alone decided which claims to assert in his case. I raised every potentially-meritorious claim I was aware of at the time. I did not intend to omit any such issues from the petition. Mr. Wood did not waive any claims; he did not understand enough about the legal arguments to make those determinations.

I declare under penalty of perjury that the foregoing is true to the best of my information and belief.

Signed this 30th day of June, 2014.

Harriette P. Levitt

Exhibit I

I, Peter J. Eckerstrom, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an attorney licensed to practice in California in 1986 and Arizona in 1988. I have been a judge of the Arizona Court of Appeals since 2003. Prior to that time, I practiced in the area of criminal defense in Arizona for fifteen years, both with the Pima County Public Defender's Office and in private practice.

2. In February 1998, I was appointed by the United States District Court for the District of Arizona to represent Joseph Wood in his federal habeas corpus proceedings in his capital case. I also represented Mr. Wood in a second petition for post-conviction relief in the Pima County Superior Court. I represented Mr. Wood until I became a judge about five years later.

3. Because I am now a judge, I do not currently represent Mr. Wood in any fashion, nor may I ethically provide any opinion about any issues which may be currently litigated in his case. The following declaration has been generated on the request of Mr. Wood's current counsel and is intended as a factual declaration only and is not intended to suggest any legal conclusion as to any issue regarding Mr. Wood's litigation.

4. During the time I represented Mr. Wood, I was not aware of a claim under *Eddings v. Oklahoma* that the Arizona Supreme Court's treatment of certain types of mitigating evidence violated the Eighth Amendment by requiring that evidence be causally connected to the crime to be considered mitigating in a capital case. I did not raise such a claim in my post-conviction or habeas petition. If I had been aware of this argument, I would have raised it on Mr. Wood's behalf.

5. It was my practice to brainstorm creative issues to assert on behalf of all my clients and to include all non-frivolous claims in every habeas petition. I did not intend to waive any such claims at any time. My co-counsel on Mr. Wood's case, Kevin Lerch, had no prior experience in capital cases or in federal habeas. As a result, I made all decisions about which arguments to assert for Mr. Wood.

6. I met with Mr. Wood on multiple occasions at the Arizona State Prison in Florence. Mr. Wood was not able to engage on legal issues. He had a high school education and records reflected his low IQ and learning disability. He was certainly not a sophisticated legal thinker and he did not provide input on which issues should be raised in his petitions. He certainly did not know and understand enough to waive any of the issues.

7. I do not have any recollection of why I decided to raise the two issues in the postconviction relief petition I filed on Mr. Wood's behalf rather than others which might have been available to be included in the petition.

I declare under penalty of perjury that the foregoing is true to the best of my information and belief.

Signed this 15th day of May, 2014.

Peter J. Eckerstrom

Exhibit J

RECEIVED
FEB 27 2002

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

Filed in Court Record
Date Filed : 02/25/2002
Time Filed: 11:49 AM

DATE: 02/22/2002

THE HON WILLIAM J O'NEIL
Division: 1
Court Reporter: NONE

ALMA JENNINGS HAUGHT, CLERK
By, FLORA C. FLORES Deputy Clerk

CR15716

THE STATE OF ARIZONA,
Plaintiff,
vs.

ARYON WILLIAMS,
Defendant(s).

MINUTE ENTRY ACTION:

RULING ON NOTICE OF POST-CONVICTION RELIEF

PRESENT:

A Notice Of Post-Conviction Relief was filed by the attorneys for Petitioner. That Notice alleges that "on June 10, 1997, Mr. Williams petitioned for a Writ of Habeas Corpus in the United States District Court for the District of Arizona. That petition is currently pending." IT IS HEREBY ORDERED the successive Notice of Post-Conviction Relief and the Request for Appointment of Counsel is dismissed without prejudice with leave to refile when the habeas corpus proceedings in federal court are concluded. Alternatively, if the Petitioner has erred and the habeas corpus proceedings in federal court are concluded, they are directed to amend the prior Notice of Post-Conviction Relief. In either event, Request For Appointment Of Counsel nunc pro tunc is DENIED.

Dated this _____day of February, 2002.

_____
JUDGE OF THE SUPERIOR COURT

Mailed/distributed copy: 2/25/2002