

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. D. DOUGLAS METCALF

CASE NO. CR028449

DATE: July 09, 2014

STATE OF ARIZONA
Plaintiff,

vs.

JOSEPH RUDOLPH WOOD
Defendant.

R U L I N G

IN CHAMBERS RULING RE: DEFENDANT'S RULE 32 PETITION FOR POST-CONVICTION RELIEF

The Court has reviewed Defendant's Petition for Post-Conviction Relief, the State's response, and Defendant's reply, as well as the court's extensive file.

The procedural history of this case is as follows.

Following a jury trial, Defendant was convicted of two counts of first degree murder and two counts of aggravated assault for crimes that occurred on August 7, 1989. Defendant was sentenced to death for each murder and for a term of imprisonment for each aggravated assault. The Arizona Supreme Court affirmed the convictions and sentences on October 11, 1994. *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994). The United States Supreme Court denied certiorari on June 19, 1995. *Wood v. Arizona*, 515 U.S. 1147, 115 S.Ct. 2588 (1995). The United States Supreme Court denied a petition for rehearing on August 11, 1995. *Wood v. Arizona*, 515 U.S. 1180, 116 S.Ct. 24 (1995). The Arizona Supreme Court issued its mandate on July 7, 1995.

Defendant filed his first Rule 32 petition for post-conviction relief on February 11, 1992. The trial court stayed the petition pending the outcome of the direct appeal to the Arizona Supreme Court. Following its receipt of the mandate, the trial court appointed new counsel to represent Defendant. Defendant filed a new Rule 32 petition for post-conviction relief on March 1, 1996. This petition raised issues concerning both the trial and the direct appeal. The trial court denied Defendant's Rule 32 petition in a minute entry dated June 6, 1997. The Arizona Supreme Court denied his petition for review on November 14, 1997. *State v. Wood*, CR-97-0377-PC Order (Ariz. Sup. Ct. Nov. 14, 1997).

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In federal proceedings, the U.S. District Court denied Defendant's application for a writ of habeas corpus. *Wood v. Schriro*, 2007 WL 3124451 (D. Ariz. 10/24/2007). The Ninth Circuit affirmed the denial. *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). The U.S. Supreme Court denied certiorari. *Wood v. Ryan*, 134 S.Ct. 239 (2013).

Defendant filed a second Rule 32 petition for post-conviction relief on August 2, 2002, while federal proceedings were pending. The trial court denied the petition on November 7, 2002. The Supreme Court denied the petition for review on May 26, 2004.

The State filed a Motion for Warrant of Execution on April 22, 2014.

Defendant filed this new Rule 32 petition for post conviction relief on May 6, 2014. In this third Rule 32 petition, Defendant raises two claims: (1) there has been a significant change in the law of "causal connection," as it relates to the consideration of mitigating evidence at sentencing, and (2) appellate counsel provided ineffective assistance as a result of an actual conflict of interest.

Pursuant to Rule 32.6(c), the Court first identifies all claims that are procedurally precluded from Rule 32 relief. An issue is precluded if it was raised, or could have been raised, on direct appeal or in a prior Rule 32 proceeding. Rule 32.2(a); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996). If the Court determines that the claims are procedurally precluded, and "no remaining claim presents a material issue of fact or law which would entitle defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed." Rule 32.6(c).

Claim 1 (Causal Connection)

When the trial court sentences a defendant to death, the Arizona Supreme Court independently reviews the record to determine whether the death penalty should be imposed. *State v. Watson*, 129 Ariz. 60, 63, 628 P.2d 943 (1981). In this case, the Arizona Supreme Court independently reviewed the record and determined that the death penalty was warranted:

We have independently reviewed the facts establishing the aggravating and mitigating circumstances. *State v. Hill*, 174 Ariz. 313, 330, 848 P.2d 1375, 1392 (1993). We have also reviewed the record for evidence of additional mitigating evidence and have found none. The state proved the existence of the A.R.S. §§ 13-703(F)(3) and (8) aggravating circumstances beyond a reasonable doubt. After review of the entire record, we conclude there are no statutory

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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. The trial court correctly concluded the aggravating circumstances outweigh the mitigating circumstances. *Cf. Cornell*, 179 Ariz. 314, 878 P.2d 1352. A.R.S. § 13-703(E) requires imposition of the death penalty.

State v. Wood, 180 Ariz. 53, 72, 881 P.2d 1158 (1994).

Defendant argues that a significant change in the law occurred after the Supreme Court reviewed the death penalty sentence.

Rule 32.1(g) allows a defendant to challenge his sentence in a post conviction relief proceeding when "[t]here 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." A defendant can raise the significant change in the law challenge in a successive Rule 32 petition if the change in the law occurred after the prior Rule 32 petition has been decided. Rule 32.2(b).

A "significant change in the law" occurs when a "transformative event" or a "clear break from the past" occurs. *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175 (2009). An appellate court overruling its previously binding case law is an example of a "significant change in the law." *Id.* at ¶ 16.

In this case, Defendant argues that a "significant change in the law" occurred when the Arizona Supreme Court decided *State v. Anderson*, 210 Ariz. 327, 349-350, ¶¶ 93-97, 111 P.3d 369 (2005). In that case, the Court acknowledged that in a capital case, the jury must be not be prevented from giving effect to mitigating evidence solely because the evidence has no causal "nexus" to defendant's crimes.

Defendant further argues that at the time the Arizona Supreme Court reviewed Defendant's conviction and sentence on direct appeal, it not follow the standard it later acknowledged in *State v. Anderson*.

The State argues that *State v. Anderson* did not establish a new standard with respect to the review of mitigating evidence. Moreover, according to the State, the Arizona Supreme Court has reviewed all mitigating factors, regardless of whether the evidence has causal "nexus" to defendant's crimes, since at least 1995, when it decided *State v. Gonzales*, 181 Ariz. 502, 514-515, 892 P.2d 838 (1995).

The Court finds that there has been no significant change in the law as to whether the Arizona Supreme Court must consider mitigating evidence regardless of its nexus to Defendant's crimes. Accordingly, Defendant's Rule 32 petition as to this issue is untimely as it could have been raised in Defendant's previous Rule 32 petitions.

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Claim 2 (Conflict of Interest of Defendant's Appellate Counsel)

Defendant claims that his Sixth Amendment right to conflict-free appellate counsel was violated when his appellate counsel, Barry J. Baker Sipe, accepted a job at the Pima County Legal Defender's Office during the briefing stage of Defendant's appeal. The Pima County Legal Defender's Office had previously represented one of Defendant's victims in an unrelated case.

As noted above, an issue is precluded from being considered in a Rule 32 proceeding if it was raised, or could have been raised, on direct appeal or in prior Rule 32 proceeding. Rule 32.2(a); *State v. Towerly*, 204 Ariz. 386, 64 P.3d 828 (2003).

The trial court appointed Mr. Baker Sipe to represent Defendant on appeal. Mr. Baker Sipe did not represent Defendant at trial or at sentencing. In addition to representing Defendant in his direct appeal to the Arizona Supreme Court, Mr. Baker Sipe filed a Rule 32 post conviction relief petition with the trial court on Defendant's behalf while the direct appeal was pending. That Rule 32 petition was stayed pending the outcome of the direct appeal. After filing the Rule 32 petition, Mr. Baker Sipe filed a motion with the trial court asking to withdraw as counsel for Defendant in the Rule 32 proceeding. Mr. Baker Sipe stated that he would soon be taking a position with the Pima County Legal Defender's Office and that office had previously represented one of Defendant's victims in a previous unrelated matter. The trial court's case file also includes an Order from the Arizona Supreme Court that Mr. Baker Sipe was allowed to withdraw from his representation of Defendant in the appeal for the same reason. The Arizona Supreme Court's Order further ordered that the matter be returned to the trial court for the appointment of counsel. Mr. Baker Sipe had filed the opening brief with the Arizona Supreme Court before he filed the motion to withdraw.

After Mr. Baker Sipe filed his motion to withdraw in the Rule 32 proceeding, but before the trial court had received the Arizona Supreme Court's Order, the trial court held a hearing and then entered an Order that the Pima County Legal Defender's Office deliver its file concerning its representation of the victim to the court for an in camera review.

Thereafter, (that is, after considering the conflict of interest issue) the trial court entered an Order that Mr. Baker Sipe would continue to represent Defendant in both the appeal and Rule 32 proceeding. This Order occurred after the trial court had received the Arizona Supreme Court's Order allowing Mr. Baker Sipe to withdraw from representing Defendant in his direct appeal.

The trial court's file shows that Mr. Baker Sipe continued to represent the Defendant in both the appeal and Rule 32 proceeding.

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After the Arizona Supreme Court issued its mandate, Mr. Baker Sipe filed a motion in the trial court asking to withdraw as counsel for Defendant. The trial court appointed attorney Harriett Levitt to represent Defendant in his Rule 32 proceeding.

Defendant argues that Mr. Baker Sipe had a conflict of interest in representing him in the direct appeal to the Arizona Supreme Court, and that as a result, he was denied effective assistance of counsel on appeal.

“A defendant alleging ineffective assistance of counsel because of a conflict of interest must demonstrate 1) that an ‘actual conflict’ existed and 2) that the conflict affected the representation.” *State v. Padilla*, 176 Ariz. 81, 83, 859 P.2d 191 (App. 1993). “Once defendant has shown an actual conflict, he must then show adverse effect.” *State v. Jenkins*, 148 Ariz. 463, 467, 715 P.2d 716 (1986). “To establish adverse effect, defendant would only have to show that his attorney’s conflict reduced his effectiveness. Hence, adverse effect is a less burdensome requirement than prejudice.” *Id.* “The fact that counsel might have performed better at trial does not rise to adverse effect. The negative impact must be substantial although it need not have caused defendant’s conviction. Whether an adverse effect has had a substantially negative impact must be determined on a case by case basis.” *Id.* “In order to establish an actual conflict of interest, a defendant must demonstrate that some plausible alternative defense strategy might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but merely that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with the attorney’s other loyalties or interests.” *State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416 (1990).

The alleged conflict of interest of Defendant’s attorney, Mr. Baker Sipe, occurred during the direct appeal of his conviction and sentence. Defendant could have raised this issue in Rule 32 petition that his new attorney, Ms. Harriett Levitt, filed on his behalf after the Arizona Supreme Court issued its mandate from his direct appeal. Generally, the failure to raise an issue in a timely filed Rule 32 petition constitutes a waiver, such that the issue cannot be raised in a successive Rule 32 petition. Rule 32.2(a)(3); *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.2d 1067 (2002). There is an exception to the waiver rule where the issue is fundamental and personal to the defendant. *Id.* at 449-450. In that instance, the defendant himself must make a knowing, voluntary, and intelligent waiver. *Id.* at 450.

In *Stewart v. Smith*, the Arizona Supreme Court held that a defendant need not make a personal waiver of his ineffective assistance claim in order to be precluded from raising the issue for a second time in a successive Rule 32 petition. *Id.* at 450 (“The ground of ineffective assistance of counsel cannot be raised

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repeatedly. There is a strong policy against piecemeal litigation.”). In cases where the defendant has raised ineffective assistance of counsel previously, the Court need not consider it again. *Id.*; see also *State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.”).

Defendant argues that he must personally waive the conflict of interest issue and because he did not, he can raise it for the first time in a successive Rule 32 petition. Defendant is conflating two different waiver issues. Defendant is correct that he may not have personally waived the potential conflict of interest Mr. Baker Sipe may have had after Mr. Baker Sipe joined the Pima County Legal Defender’s Office, given that that office had previously represented one of Defendant’s victims in a previous matter.

However, the waiver issue that precludes successive Rule 32 petitions arises in the context of whether Defendant waived that issue by not raising it in his first Rule 32 Petition. Defendant raised several issues in his first Rule 32 petition addressing Mr. Baker Sipe’s alleged ineffective assistance in representing Defendant on appeal. Defendant could have raised the conflict of interest issue in that Rule 32 Petition. By not doing so, Defendant waived it. That is, Defendant could not file his first Rule 32 Petition alleging ineffective assistance by Mr. Baker Sipe as to some issues, and then file a subsequent Rule 32 Petition raising new claims as to why Mr. Baker Sipe’s representation was ineffective. See e.g. *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (App. 1996) (“If preclusion sets any boundaries at all, it prevents a defendant from endlessly raising claims he has raised before, claiming each new incarnation to be an issue of first impression. Otherwise, criminal defendants could endlessly litigate effectiveness of counsel by claiming that their latest version (complete with evidence which, as in this case, could have been presented many years before) was not presented on earlier petitions due to counsel’s inadequate representation. Such an approach would lead to a never-ending tunnel of PCRs.”).

Accordingly, the Court finds that Defendant waived his claim of ineffective assistance of counsel on appeal due to a potential conflict of interest because he could have raised the issue in the first Rule 32 petition he filed following his direct appeal.

Based on the foregoing,

IT IS ORDERED that Defendant’s Rule 32 petition is DISMISSED.

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