Julie S. Hall, Bar No. 017252
779 S Cody Loop Rd
Oracle, Arizona 85623
(520) 896-2890
JulieSHall@hotmail.com

Attorney for Mr. Wood

IN THE SUPREME COURT OF THE STATE OF ARIZONA

State of Arizona,	No.
Plaintiff,	Pima County Superior Court No. CR-28447
v.	Petition for Review/Motion to Recall Mandate/Motion for Stay
Joseph R. Wood,	
Defendant.	**Execution Scheduled July 23, 2014, 10:00 am**

Questions Presented for Review

Did *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005), represent a significant change in this Court's application of its "causal connection" requirement for mitigating evidence in capital cases, and did the court below err in finding preclusion based on waiver when the State expressly disavowed that argument?

Did the trial court err in refusing to require a knowing, voluntary, and intelligent waiver of Mr. Wood's conflict of interest claim?

May a claim that a defendant's rights were violated by his attorney's conflict of interest be precluded from review based on prior presentation of ineffective assistance of counsel claims?

Procedural Background

On May 6, 2014, Joseph Wood filed a petition for postconviction relief in the Pima County Superior Court raising two issues related to his capital convictions and sentences. *State v. Wood*, No. CR-028449 Pet.forPostconviction Relief (Pima Cty.Super.Ct. May 6, 2014). Following the State's response, Mr. Wood replied. On July 9, 2014, the court issued its ruling dismissing the petition and finding both claims precluded from review. *Id.*, Ruling. Mr. Wood now asks this Court to stay the execution scheduled for July 23, 2014; accept review of his case; answer the important questions presented; and reverse the lower court's erroneous holdings. In the alternative, Mr. Wood asks this Court to stay the execution and recall its previously-issued mandate to permit a direct appeal in which Mr. Wood is

represented by non-conflicted counsel and in which there is no unconstitutional restraint on mitigating evidence.

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 and 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 addiction to alcohol after returning from Viet Nam. ROA at 504. He drank "to compensate for nerves, pressure, stress, memories[,]" indicating he 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. 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 this 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, this 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, this Court allowed the appeal to proceed.

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

Reasons this Petition Should Be Granted

I. Did *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005), represent a significant change in this Court's application of its "causal connection" requirement for mitigating evidence in capital cases?

Mr. Wood's first claim, that this Court erred in failing to consider non-causally connected mitigation evidence in its independent review, is not precluded because it arises from a significant change in the law. Ariz.R.Crim.P. 32.1(g); 32.2(b). This 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." *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995) (citations omitted). As demonstrated in the discussion of the merits below, this Court committed a causal connection/*Eddings* error in multiple capital direct appeals from at least 1981 to 2001. It was not until 2005 that this 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. 274, 28-87, 124 S.Ct. 2562 (2004)).[1] It was not until *Anderson* that this 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.[2]

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). "[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

---

[1]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).

[2]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.

postconviction proceeding concluded.

The court below concluded that Mr. Wood's *Anderson* claim could have been raised in a prior petition for postconviction relief, even though the State conceded the claim was not waived by a failure to present it sooner. *Compare* Ruling, at 4, *with State v. Wood*, No. CR-28440 Response to Pet.forPostconvictionRelief, at 13-14 (Pima Cty.Super.Ct. June 17, 2014). Given the State's express abandonment of that argument, the lower court's finding of waiver was error.

The court below held that "there has been no significant change in the law as to whether this Court must consider mitigating evidence regardless of its nexus to Defendant's crimes." Ruling, at 4. The lower court did not explain the basis for its ruling, but cites the State's reliance on *State v. Gonzales*, 181 Ariz. 502, 514-15, 892 P.2d 838 (1995), in reaching its conclusion.

In *Gonzales*, this Court noted the rule that a sentencer "must consider the mitigating factors in A.R.S. § 13-703(g) as well as any aspect of the defendant's background or the offense relevant to determining whether the death penalty is appropriate." 181 Ariz. at 514. Nevertheless, as it always did prior to *Tennard* and *Anderson*, this Court discounted social history categories of non-causally connected mitigating evidence to the point of irrelevance. *Id.*, at 515. There is no material difference between discounting evidence to irrelevance and refusing to consider

evidence as mitigating. *See Porter v. McCollum*, 558 U.S. 30, 42 (2009) (identifying Florida Supreme Court's error as either failing to consider or "unreasonably discount[ing]" mitigating evidence of childhood abuse and military service). Whether characterized as a refusal to consider or discounting to irrelevance, the result and the Eighth Amendment error are the same: until *State v. Anderson*, this Court failed to meaningfully consider non-causally connected social history mitigation. This is demonstrated by the fact that not once in the entire history of this Court's independent review did this Court find non-causally connected family history evidence to be meaningful or to have significant weight. The alteration of this Court's rule for meaningful consideration, through the causal connection requirement, changed after *Tennard*. *Anderson* thus represents a significant change in the law because, prior to that decision, non-causally connected mitigating evidence was deemed irrelevant. After that decision, this Court recognized that that type of evidence must be given weight. Because there was a significant change in Arizona law in *Anderson*, Mr. Wood's claim is not precluded and should be considered on the merits.

II. Did the trial court err in refusing to require a knowing, voluntary, and intelligent waiver of Mr. Wood's conflict of interest claim?

The facts regarding the conflict claim are materially undisputed. The court below erred, however, in two important respects. First, it failed to apply the personal

waiver requirement to the preclusion analysis. Second, it treated Mr. Wood's conflict of interest claim as an ineffective assistance of counsel claim for purposes of considering claims previously waived. As we explain, these errors resulted in an erroneous finding that the claim is precluded.

The trial court accused Mr. Wood of conflating two different waivers, but it was the court below that misunderstood the waiver argument. Ruling, at 6. The State has not disputed, and the court below agreed, that appellate counsel's conflict of interest required a personal waiver by Mr. Wood. *Id*; *see also 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)). The lower court held, however, that the relevant waiver here was first postconviction counsel's failure to raise the claim in the first state postconviction petition and, as to that claim, no personal waiver was

required. *Id*. The court failed to apply the sufficient constitutional magnitude exception to this determination. That exception requires Mr. Wood to show that the underlying claim–the conflict of interest–required a personal waiver. Mr. Wood has shown this. It does not require, as the court below believed, a showing that postconviction counsel's failure to raise the conflict claim requires a personal waiver. The court below concluded that Mr. Wood "waived his claim of ineffective assistance of counsel on appeal due to a conflict of interest because he could have raised the issue in the first Rule 32 petition. . .." Ruling, at 7. The parties have not disputed this to be the case. But this is where the sufficient constitutional magnitude exception begins, not where it ends.

In considering the sufficient constitutional magnitude exception, a court must consider "the nature of the right allegedly affected by counsel's ineffective performance. If that right is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded." *Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067, 1071 (2002). Mr. Wood demonstrated that his conflict of interest claim required a personal waiver because it is the underlying claim here. Mr. Wood has never made a personal waiver of this claim. Harriette Levitt, first postconviction counsel, has sworn that Mr. Wood did not make any decisions about which issues to raise in the first postconviction

petition. Ex. H, at ¶ 5. Nor was he capable of making an intelligent decision in that regard. *Id*. The State did not dispute this evidence below and the lower court did not find otherwise. Because the lower court agreed the conflict of interest claim is one which requires a personal waiver, and it is undisputed that Mr. Wood did not personally waive it, the claim is not precluded.

The court below also based its decision on the fact that other ineffective assistance of counsel claims were raised in the first postconviction petition. Ruling, at 6, *citing State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996), and *Stewart v. Smith*, 202 Ariz. at 450. This again, however, establishes preclusion in the first instance and we did not dispute that point. What the court below failed to grasp is that the sufficient constitutional magnitude exception still may apply in this circumstance. Mr. Wood is not re-raising his ineffective assistance claims with new supporting facts. Instead, he is raising an entirely different claim, one based on appellate counsel's conflict of interest and the trial court's refusal to follow this Court's order to appoint new counsel. If that claim, which requires a personal waiver, could be precluded because other Sixth Amendment claims which do not require a personal waiver were raised in the first state postconviction petition, then the sufficient constitutional magnitude exception would be essentially meaningless and fundamentally unfair.

More importantly, Mr. Wood is not raising an additional ineffective assistance of counsel claim. Rather, he is asserting the claim that the trial court and this Court erred in not complying with the mandate for non-conflicted counsel. The Sixth Amendment violation based on a conflict of interest is an entirely different species than the Sixth Amendment violation based on counsel's deficient and prejudicial performance. They are grounded in distinct lines of United States Supreme Court jurisprudence which require them to be determined under different legal standards. *Compare Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980), *with Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). The substance of Mr. Wood's claim is that the lower court failed to enforce this Court's order that appellate counsel withdraw from the representation. This is an entirely different claim than the ineffective assistance of counsel claims raised in the first petition. Thus, the assertion of ineffective assistance of counsel claims in the first petition does not preclude the application of the sufficient constitutional magnitude exception to preclusion upon the bringing of a conflict of interest claim in a successive petition.[3]

This Court should remand to the lower court for a decision on the merits of Mr. Wood's claim. Because this claim is not precluded, this Court should stay Mr.

---

[3]At minimum, this is an issue of first impression in Arizona and this Court should stay Mr. Wood's execution and order full briefing and consideration of the issue.

Wood's execution until the proceedings are concluded.

III. Mr. Wood Will Prevail on the Merits of His Claims.

Although the court below did not reach the merits of the claims raised in Mr. Wood's petition for postconviction relief, we address them here to demonstrate that the procedural errors described above are not inconsequential.

A. *This Court unconstitutionally rejected mitigating evidence in affirming the death sentences.*

In its opinion rejecting Mr. Wood's direct appeal, this 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, this 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, this 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 meaningful consideration 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 United States Supreme 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, this 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). This Court failed to meaningfully 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. This 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 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. This 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, this Court excluded it from meaningful consideration.[4]

---

[4]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

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 . . . give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). This Court's 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, this Court required 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*, this Court relied on *State v. Wallace*, 160 Ariz. at 426-27, 773 P.2d at 985-86 (1989), a decision pre-dating *Wood*, for the proposition that for mitigation to be considered and given weight "our jurisprudence requires the nexus [to the crime] be proven." *Id.*

---

problems might influence sentencer's appraisal of defendant's moral culpability even though not causally connected to crime).

This 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 [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 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 appellant's claim of dysfunctional family history as mitigating circumstance with 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 appellant's difficult family background would not mitigate 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 appellant's alleged mental illness mitigating weight where appellant failed to establish 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 appellant's difficult family background was not mitigating circumstance where 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 appellant 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, this 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*.").

The error 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 sentencer.

The United States 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 United States Supreme Court 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 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.[5] This Court should follow

---

[5]*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) (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

Supreme Court precedent and hold that the causal connection 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 father, trauma from living in a home filled with domestic turmoil, 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"); *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

---

Eddings/*Lockett* "compels a remand for resentencing").

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 this 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. Mr. Wood Was Denied Conflict-free Counsel in His Direct Appeal.

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 also 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 this type of Sixth Amendment claim, 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 of her

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 portray her as dishonest and manipulative. When conflicted counsel was appointed for the appeal, he discarded this defense supported by record evidence, and 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 decision took the focus of the defense case off of Ms. Dietz and shined the spotlight solely on Mr. Wood. Unfortunately, no record evidence or testimony supported the theory 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. Because conflicted counsel's theory of the case was entirely unsupported by the record he inherited, it can only be explained by his conflict in presenting evidence that was critical of Ms. Dietz. Appellate counsel's conflict had an adverse effect on his representation of Mr. Wood because it caused him to choose a defense entirely unsupported by the evidence over a plausible, record-based defense. For this reason, appellate counsel abandoned his obligation to advocate for Mr. Wood with undivided loyalty as required under the

Sixth Amendment.

Consistent with this Court's prior decision, the State below did not dispute that there was a conflict of interest. This Court has also previously determined that conflict required appellate counsel to withdraw. Ex. F. It is the required relief (a direct appeal with non-conflicted counsel) which has been denied to this point. This Court should grant the relief required by its prior order. This matter should be set for a new direct appeal in which Mr. Wood is finally represented by non-conflicted counsel.

IV. Motion to Recall the Mandate

Where appropriate in the interests of justice, this Court has inherent authority to recall its mandate. *Lindus v. Northern Insurance Company of New York*, 103 Ariz. 160, 162, 438 P.2d 311(1968) ("Where the interests of justice outweigh the interest in bringing litigation to an end the court should recall the mandate."); *see also United States v. Ohio Power Co.*, 353 U.S. 98, 99, 77 S.Ct. 652, 653 (1957) ("the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules"); *State v. Soto*, 223 Ariz. 407, 224 P.3d 223, (Ariz.App. 2010) (recalling mandate and reinstating appeals after determining that §13-4033(C) was unconstitutional as applied to defendant), *vacated on other grounds by State v. Soto*, 225 Ariz. 532, 241 P.3d 896 (2010); *State v. Lucas*, 165 Ariz. 546, 799 P.2d

887(Ariz. App. 1990) (extraordinary circumstances justify recalling the mandate); *State Farm Mut. Ins. Co. v. Superior Court, Pima Co.,* 15 Ariz. App. 3, 485 P.2d 593 (1971) (mandate recalled to clarify Court's opinion).

This Court has previously acted in this way to correct errors in capital cases. In *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978), this Court declared Arizona's death penalty statute unconstitutional to the extent that it restricted the mitigating factors a trial court could consider in deciding whether to impose the death penalty. Following *Watson*, this Court, on its own initiative, de-finalized the direct appeals it had previously and erroneously decided under the unconstitutional statute and remanded those cases to the trial courts for resentencing. *See State v. Ceja*, 126 Ariz. 35, 36, 612 P.2d 491, 492 (1980) ("After *Watson*, we then remanded the current death penalty cases to the trial courts for resentencing under the standards enunciated in that case."). Rather than requiring similarly situated death row inmates to pursue relief under Rule 32 (a procedure that was by then well-established), this Court issued orders in direct appeals that had already become final, remanding the cases for resentencing. *See e.g., id.* (direct appeal decided May 16, 1977; order to remand issued more than one year later); *State v. Knapp*, 125 Ariz. 503, 503, 611 P.2d 90, 90 (1979) (direct appeal decided March 9, 1977; order to remand issued more than one year later); *State v. Blazak*, 131 Ariz. 598, 599, 643

P.2d 694, 695 (1982) (direct appeal decided January 20, 1977; order to remand issued December 6, 1979). The errors in this case require this Court's exercise of that authority as well.

First, Mr. Wood's claim that this Court conducted its independent review in an unconstitutional manner in his case is an extraordinary circumstance because a fundamental miscarriage of justice will result if he is executed and many others who are similarly situated are granted relief. The Ninth Circuit Court of Appeals will soon address the very error raised here, 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 this Court, and followed in its review of Mr. Wood's capital sentences, will be overturned. Relief may be granted in a number of Arizona capital cases, all final on direct review for many years as the case is here. While this Court may disagree with that decision, *see State v. Styers*, *supra*, it should recognize that executing Mr. Wood while *McKinney* is pending *en banc* argument and decision could result in grossly unfair result: that Mr. Wood will die despite having raised here the precise claim upon which others similarly situated were shortly-thereafter afforded relief. This Court should exercise its inherent authority to avoid that result. At minimum, this Court

should stay Mr. Wood's execution until the Ninth Circuit has ruled in *McKinney*. That will preserve this Court's jurisdiction over Mr. Wood and his claim and ensure the petition is not rendered moot by Mr. Wood's execution in the interim.

Mr. Wood's conflict of interest claim also presents extraordinary circumstances justifying this Court's exercise of its power to recall its mandate. The Sixth Amendment right to counsel is among the most precious in criminal cases. As explained above, this Court permitted appellate counsel to represent Mr. Wood despite a serious conflict, effectively denying Mr. Wood assistance at a vital stage of the case against him. Moreover, it is extraordinary that this occurred despite defense counsel's motion to withdraw, Mr. Wood's refusal to waive the right, and this Court's order that counsel be replaced. We are unaware of any other capital case in which a similar error has occurred: where a ruling in the defendant's favor that his counsel was unable to serve was ignored and conflicted counsel was allowed to proceed despite a final order of the State's highest court to the contrary. Because this is an error upon which Mr. Wood has already sought *and been granted* relief, this Court should not deny Mr. Wood the relief to which it has already determined he is entitled. It should exercise its authority to recall the mandate and enforce that relief.

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, either through the grant of the petition for review or recall of the mandate. 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). This Court should find that Mr. Wood's two claims are not precluded under Rule 32.2 and grant Mr. Wood a stay of his execution, currently scheduled to be carried out on July 23, 2014, just over one week from today. Should this Court not grant immediate relief on the petition for review or motion to reacall the mandate, it should stay the execution and remand so that the court below may give full and fair consideration to the merits of the issues raised in the petition.

Respectfully submitted this 14th day of July, 2014.

s/Julie S Hall
Counsel for Mr. Wood

Copy of the foregoing e-mailed
this 14th day of July, 2014, to:

Jeffrey L Sparks
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007
Jeffrey.Sparks@azag.gov

Julie S Hall