ARIZONA SUPREME COURT

STATE OF ARIZONA, Respondent, v. JOSEPH R. WOOD, Petitioner.	CR–14–0223–PC Pima County Superior Court No. CR–28447

THE STATE OF ARIZONA'S OPPOSITION TO PETITION FOR REVIEW

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

Jeffrey A. Zick
Chief Counsel

Jeffrey L. Sparks
Assistant Attorney General
Criminal Appeals Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
cadocket@azag.gov
(State Bar Number 027536)

Attorneys for Respondent

Twenty years after his direct appeal to the Arizona Supreme Court, 17 years after his initial post-conviction relief proceeding, 8 months after his federal habeas corpus proceeding concluded, and less than 2 weeks after the State filed a motion for warrant of execution, Petitioner Joseph Wood filed a successive petition for post-conviction relief. The petition raised two claims: the first alleging that a significant change in the law applicable to his case occurred a decade ago, and the second alleging a conflict of interest of appellate counsel that Wood has known about, but failed to raise, for 20 years. This Court should deny Wood's petition for review because the trial court did not abuse its discretion in dismissing the petition.

I. ISSUES PRESENTED FOR REVIEW.

1. Did *State v. Anderson*, 210 Ariz. 327, 349, ¶ 93, 111 P.3d 369, 391 (2005), in which this Court observed that the United States Supreme Court held in *Tennard v. Dretke*, 542 U.S. 274 (2004), 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," constitute a "significant change in the law" pursuant to Arizona Rule of Criminal Procedure 32.1(g)?
2. Did the trial court abuse its discretion when it concluded that Wood waived his 20-year-old claim of a conflict of interest of appellate counsel by failing to raise it in prior PCR proceedings?

II. FACTS MATERIAL TO THE ISSUES PRESENTED.

A. *Trial proceedings.*

A jury found Petitioner Joseph Wood guilty of the August 7, 1989 first-degree murders of his estranged girlfriend Debra Dietz and her father Eugene Dietz. *State v. Wood*, 180 Ariz. 53, 60–61, 881 P.2d 1158, 1165–66 (1994). After

an aggravation-mitigation hearing, the trial court found two aggravating circumstances: Wood was convicted of one or more other homicides during the commission of each offense, A.R.S. § 13–703(F)(8), and in the commission of the offenses Wood knowingly created a grave risk of death to another person or persons in addition to the victims, A.R.S. § 13–703(F)(3). *Id.* at 69, 881 P.2d at 1174. The trial court also found the following mitigating circumstances:

> Lack of any prior felony convictions and any other mitigating circumstances set forth in the presentence report, including all testimony presented by the psychiatrist ... [in] mitigations [sic] of sentence. Including the chemical substance abuse problems which you have suffered from, the Court finds that ... [the] mitigating circumstances are not sufficiently mitigating to outweigh the aggravating factors found by this Court beyond a reasonable doubt.
> *Id.* at 70, 881 P.2d at 1175. The court sentenced Wood to death for each murder and to concurrent 15–year prison terms for the aggravated assaults. *Id.* at 61, 881 P.2d at 1166.

Id. at 70, 881 P.2d at 1175. The court sentenced Wood to death for each murder. *Id.* at 61, 881 P.2d at 1166.

B. *Direct appeal.*

This Court affirmed Wood's convictions and sentences on direct appeal. *Wood*, 180 Ariz. 53, 881 P.2d 1158. The Court also independently reviewed the aggravating and mitigating evidence and determined that the trial court correctly concluded that the aggravating circumstances outweighed the mitigating circumstances, thus supporting the imposition of the death penalty. In reviewing the mitigation evidence, this Court concluded that Wood failed to prove the (G)(1)

mitigating factor: that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution." *Id.* at 70–71, 881 P.2d at 1175–76. The court also found that Wood's "impulsive personality and history of substance abuse" merited little weight as non-statutory mitigation because he was not under the influence during the murders and there was no evidence that his impulsivity left him unable to control his conduct. *Id.* at 71, 881 P.2d at 1176. Next, the court rejected Wood's argument that he established two additional statutory mitigating circumstances: that he was under unusual and substantial duress, and that he could not reasonably have foreseen that his conduct would cause or would create a grave risk of death. *Id.* The court also noted that "[d]espite close scrutiny," the record revealed no other non-statutory mitigating circumstances. *Id.* at 71–72, 881 P.2d at 1176–77. Finally, even though Wood proffered his childhood in a dysfunctional family as a mitigating factor, the court found this claim unsubstantiated and lacking in mitigating weight in the absence of any evidence that "his allegedly poor upbringing related in any way to the murders." *Id.* at 72, 881 P.2d at 1177.

C. *Initial post-conviction relief proceeding.*

Wood filed a PCR petition on March 1, 1996. *See Wood v. Schriro*, No. CV–98–053–TUC–JMR, 2007 WL 3124451, *2 (D. Ariz. Oct. 24, 2007). The trial court denied the petition on June 6, 1997, and this Court denied review. *Id.*

D. *Federal habeas corpus proceeding.*

In 1998, Wood filed a petition for writ of habeas corpus in federal district court, in which he asserted claims including prosecutorial misconduct, a confrontation clause violation, insufficient evidence to support the (F)(3) aggravating factor, ineffective assistance of counsel at trial and sentencing, and ineffective assistance of appellate counsel. *Id.* The district court denied relief on October 25, 2007. *Id.* The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief on September 10, 2012. *Wood v. Ryan*, 693 F.3d 1104 (9th Cir. 2012). On October 7, 2013, the Supreme Court denied certiorari. *Wood v. Ryan*, 134 S. Ct. 239 (2013) (Mem.).

E. *Wood's first successive PCR petition.*

On August 2, 2002, while his federal habeas petition was pending in the district court, Wood filed a successive PCR petition in this Court, arguing that *Ring v. Arizona*, 536 U.S. 584 (2002), should apply retroactively to his case and that the prosecutor committed misconduct in his trial. (Exhibit A.) The court dismissed the petition on November 7, 2002. (*Id.*)

F. *Wood's second successive PCR petition.*

On April 22, 2014, after Wood had exhausted all state and federal appeals, the State filed a motion for warrant of execution in this Court. Two weeks later, Wood filed this successive PCR petition, raising two claims: (1) this Court violated the Eighth Amendment by failing to consider mitigating evidence in the absence of a causal connection to the murders (Claim One), and (2) deprivation of the rights to the effective representation of appellate counsel and conflict-free appellate counsel (Claim Two).[1]

On July 9, 2014, the superior court dismissed Wood's petition. With respect to Claim One, the court concluded that *Anderson*, 210 Ariz. 327, 111 P.3d 369, did not constitute a significant change in the law regarding this Court's consideration of mitigating evidence. Therefore, the claim was precluded as untimely because it could have been raised in previous PCR proceedings. With respect to Claim 2, the court concluded that by raising allegations of appellate counsel's ineffectiveness in initial Rule 32 petition, Wood waived his claim of appellate counsel's conflict of interest. On July 14, 2014, Wood petitioned for review of the dismissal of his PCR petition to this Court.

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[1] After Wood filed his PCR petition, this Court issued a warrant of execution, scheduled for July 23, 2014.

III. REASONS THIS COURT SHOULD DENY REVIEW.

The trial court did not abuse its discretion in dismissing Wood's second successive PCR petition because *Anderson* did not mark a significant change in the law and because Wood waived his conflict of appellate counsel claim by waiting 20 years to raise it. Accordingly, this Court should deny the petition for review because Wood cannot establish that no Arizona decision controls any point of law in question, a decision of this Court should be overruled, the Court of Appeals has issued conflicting decisions, important issues of law have been incorrectly decided, or that any compelling reason exists for this Court to grant review. *See* Ariz. R. Crim. P. 31.19(c)(3). For the same reason, this Court should deny Wood's request for a stay of execution.

A. ***Standard of review.***

This Court reviews a trial court's denial of a PCR petition for an abuse of discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996); *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

B. ***Claim One.***

Wood argues that he is entitled to relief under Rule 32.1(g) because this Court's decision in *Anderson*, 210 Ariz. at 349, ¶ 93, 111 P.3d at 391, in which it noted that the United States Supreme Court held in *Tennard*, 542 U.S. 274, that "a jury cannot be prevented from giving effect to mitigating evidence solely because

the evidence had no 'nexus' to a defendant's crimes," constituted "a significant change in the law that if determined to apply to [his] case would probably overturn the . . . sentence." Ariz. R. Crim. P. 32.1(g). This claim fails because *Anderson* was not a significant change in the law. Alternatively, even if this Court considered the merits of Wood's claim, he still is not entitled to relief because this Court did not apply an unconstitutional causal nexus test when considering the mitigating evidence.

Rule 32.1(g) is intended to include "all claims for retroactive application of new constitutional and nonconstitutional legal principles." Comment to Ariz. R. Crim. P. 32.1(g). A "significant change in the law" under Rule 32.1(g) "requires some transformative event, a 'clear break from the past.'" *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009) (quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991)). Such a transformative event occurs, for example, when an appellate court overrules previously binding case law or when a statutory or constitutional amendment represents a "definite break from prior law." *Id.* at 118–19, ¶¶ 16–17, 203 P.3d at 1178–79. The trial court correctly concluded that *Anderson* constituted no such break.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), the Supreme Court found that an Ohio statute permitting consideration of only three mitigating factors in capital sentencing violated the Eighth Amendment, holding that the sentencer may "not be

precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Four years later, in *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982), the Court applied *Lockett's* rule to situations where a court was precluded, as a matter of law, from considering relevant mitigating evidence: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." The Court noted that the sentencer may "evaluate the evidence in mitigation and find it wanting as a matter of fact," but may not be precluded from considering proffered mitigation "as a matter of law." *Id.* at 112–13; *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (sentencer must be able "to consider and give effect to [the mitigating] evidence in imposing sentence"). In *Tennard*, 542 U.S. at 287, the Supreme Court applied the *Lockett/Eddings* principle to Texas's "screening test" where mitigation evidence that did not bear a "nexus" to the crime was irrelevant and precluded from the jury's consideration. The Court held that this test impermissibly prevented the jury from considering and giving effect to mitigating evidence. *Id.*

In *Anderson*, this Court, citing *Tennard*, noted that "[t]he Court also recently held 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." 210

Ariz. at 349, ¶ 93, 111 P.3d at 391. Wood contends that before *Anderson*, this Court consistently violated *Lockett* and *Eddings* by requiring a causal connection to the crime before considering mitigating evidence. Thus, he argues, when this Court acknowledged *Tennard*, it "recognized that Arizona law must be changed," thereby creating a significant change in the law. (PFR, at 7.)

Wood's contention that *Anderson* constituted a significant change in the law rests on the faulty premise that before that case, this Court always violated *Eddings* by precluding, as a matter of law, consideration of mitigating evidence that lacked a causal relationship to the crime. A brief history of this Court's jurisprudence demonstrates his mistake. Shortly after *Lockett*, this Court found Arizona's capital sentencing statute unconstitutional because it limited the sentencing judge's consideration of relevant mitigation to only those mitigating circumstances included in the statute. *State v. Watson*, 120 Ariz. 441, 444–45, 586 P.2d 1253, 1256–57 (Ariz. 1978). The Legislature soon amended the statute to conform to *Lockett* by requiring that the sentencer in a capital case consider, in addition to the statutory mitigating factors, "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." A.R.S. §13–703(G).[2] This

[2] The statute was renumbered in 2009, and is now codified without amendment at A.R.S. §13–751.

reform also applied to this Court's "independent review" of the "aggravating and mitigating factors as well as the propriety of the death sentence." *See State v. Bocharski*, 218 Ariz. 476, 492, 189 P.3d 403, 419, ¶ 79 (2008).

Consistent with this statutory reform, this Court faithfully complied with *Eddings'* holding by requiring the consideration of all relevant proffered mitigation in capital sentencing. *See, e.g., State v. Gonzales*, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995) (sentencer "must consider relevant evidence offered in mitigation"); *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) (setting aside death sentence and citing *Eddings* in requiring consideration of defendant's age as mitigating factor); *State v. McMurtrey*, 136 Ariz. 93, 101–02, 664 P.2d 637, 645–46 (1983) ("the sentencer may not refuse to consider, as a matter of law, relevant evidence presented in mitigation").

Although this Court has used a causal nexus analysis to assess the *weight* to be given to mitigating evidence, it clarified numerous times before *Anderson* that a capital sentencer may not be prohibited from considering proffered mitigation, and that the absence of a causal nexus to the crime affects only the weight of the evidence. *See, e.g., State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26–28, 77 P.3d 30, 37 (2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish statutory mitigating circumstance or weighty

nonstatutory mitigation); *id.* at 241, ¶ 36, 39 (given lack of causal link between childhood and crime, a reasonable jury would have accorded this factor "only minimal weight"); *State v. Jones*, 197 Ariz. 290, 313, ¶ 75, 4 P.3d 345, 368 (2000) (absent nexus to the crime, mitigating evidence was not entitled to weight); *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983) ("When a defendant is being sentenced for first-degree murder, the sentencing court must consider, in addition to the mitigating circumstances of A.R.S. § 13–703(G), any aspect of the defendant's character or record and any circumstances of the offense relevant to determining whether a sentence less than death might be appropriate."). This jurisprudence is consistent with *Eddings*, and also the principle that a capital sentencer is not required to find particular mitigating evidence relevant, nor to give it any mitigating weight. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.").

Neither *Tennard* nor *Anderson* marked a "clear break from the past," *Shrum*, 220 Ariz. at 118, ¶ 15, 203 P.3d at 1178, because, as demonstrated above, this Court has faithfully complied with *Lockett* and *Eddings'* mandate that a capital sentencer must not be precluded, as a matter of law, from considering relevant mitigation. Furthermore, *Tennard* did not announce a new rule, but involved a garden-variety application of *Eddings'* general principle to a new fact pattern. *See*

Smith v. Texas, 543 U.S. 37, 45 (2004) (mitigating evidence that was precluded, as a matter of law, because it lacked a nexus or link to the crime, was plainly relevant for mitigation purposes "under [the Supreme Court's] precedents, even those predating *Tennard*").[3] Nor did this Court's recognition of *Tennard* in *Anderson* change Arizona law—the court had recognized since *Lockett* and *Eddings* that the Eight Amendment forbade the legal preclusion of relevant mitigation. *See, e.g.*, *McMurtrey*, 136 Ariz. at 102, 664 at 637, 646; *Watson*, 120 Ariz. at 444–45, 586 P.2d at 1256–57. The fact that this Court sometimes employed a causal nexus analysis to assess the *weight* to be given mitigating evidence, both before and after *Anderson*, does not demonstrate that *Anderson* significantly changed Arizona law. Because *Anderson* did not mark a "clear break from the past," signify a "transformative event," or overrule any previously binding case law, it was not a significant change in the law that would support a claim under Rule 32.1(g). *Shrum*, 220 Ariz. at 118–19, ¶¶ 16–17, 203 P.3d at 1178–79.[4]

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[3] Wood identifies no court in any jurisdiction that has found that *Tennard*, or *Anderson*, established a new rule of constitutional law.

[4] Wood also speculates that even if *Tennard*/*Anderson* did not provide a significant change in the law, that change may occur with the Ninth Circuit's en banc review in *McKinney v. Ryan*, No. 09–99018. (PFR, at 35–36.) But the issue there is whether this Court complied with *Eddings* and *Tennard* when it evaluated McKinney's mitigating evidence; the outcome will have no bearing on Wood's case. *See McKinney v. Ryan*, 730 F.3d 903, 920–21 (9th Cir. 2013).

Wood's inability to demonstrate a significant change in the law has two consequences. First, because Rule 32.1(g) is inapplicable, Claim 1's assertion of an Eighth Amendment violation is a claim that his death sentences were "in violation of the Constitution of the United States" under Rule 32.1(a). This claim is therefore precluded under Rule 32.4(a) because claims under Rule 32.1(a) may not be brought in a successive PCR petition.[5] *See* Ariz. R. Crim. P. 32.4(a) ("Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)."). Second, Wood is not entitled to relief on the merits because he cannot show a significant change in the law under Rule 32.1(g). Accordingly, this Court should deny Wood's request for a stay of execution and deny his petition for review.

Even if *Anderson* had constituted a significant change in the law, Wood still is not entitled to a stay of execution or relief on the merits of Claim One because

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[5] The superior court also could have dismissed Claim One because Wood failed to comply with Rule 32.2(b) by explaining why he failed to bring the claim in a timely manner, instead of waiting 9 years after *Anderson* was decided. *See* Ariz. R. Crim. P. 32.2(b) ("When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.").

this Court did not use an unconstitutional causal nexus test to preclude the consideration of mitigating evidence in its independent review of his death sentences. In its independent review of Wood's death sentences, this Court engaged in a lengthy and thorough review of all of the mitigation in the record. *Wood*, 180 Ariz. at 70–72, 881 P.2d at 1175–77. In conclusion, this Court stated:

> After 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. The trial court correctly concluded the aggravating circumstances outweigh the mitigating circumstances.

Id. at 72, 881 P.2d at 1177.

The record demonstrates that this Court faithfully complied with *Eddings* by considering all of Wood's proffered mitigation. *See* 455 U.S. at 113–14 (sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence"). The court acknowledged its duty to consider all relevant, proffered mitigation, addressed each of Wood's proffered mitigating circumstances, assessed whether he proved those mitigating circumstances by a preponderance of the evidence,[6] and if so, determined how much weight those mitigating circumstance carried. Under these circumstances, this Court did not violate *Eddings* by giving any of Wood's

[6] States may require a defendant to prove the existence of mitigating circumstances. *See Walton v. Arizona*, 497 U.S. 639, 650–51 (1990).

mitigation evidence "no weight by *excluding* such evidence from their consideration." *See id.* at 114–15 (emphasis added).

Moreover, this Court did not use a causal nexus test to preclude the consideration of any of Wood's proffered mitigation. *See Anderson*, 210 Ariz. at 349, ¶ 93, 111 P.3d at 391 (sentencer "cannot be prevented from giving effect to mitigating evidence solely because the evidence has no causal 'nexus' to a defendant's crimes"). Wood nonetheless argues that the court employed an unconstitutional causal nexus requirement when it failed to find his dysfunctional childhood mitigating and when it stated that, "in isolation," his substance abuse and alleged impulsive personality were not sufficiently substantial to call for leniency. *See Wood*, 180 Ariz. at 72, 881 P.2d at 1177.

This Court's assessment of Wood's assertion that he was raised in a dysfunctional family was proper because the record is clear that the court *considered* this proffered mitigating factor. The court's primary reason for failing to find this factor mitigating was that the evidence simply failed to "substantiate[]" the claim. This conclusion was consistent with Arizona law, which requires a defendant to prove the existence of mitigating circumstances by a preponderance of the evidence. *See Bible,* 175 Ariz. at 605, 858 P.2d at 1208; *see also Walton*, 497 U.S. 650–51 (constitution does not prohibit states from requiring capital defendants to prove existence of mitigating circumstance). Having concluded that

Wood failed to meet this burden, the court declined to find Wood's assertion of a dysfunctional childhood mitigating. *Wood*, 180 Ariz. at 72, 881 P.2d at 1177. The court's alternative observation that Wood failed to demonstrate how his allegedly poor upbringing related to the crimes simply acknowledged that even if established, this mitigating factor carried little weight. *See Harris*, 513 U.S. at 512 (the "Constitution does not require a State to ascribe any specific weight to particular factors").

Nor did this Court violate *Tennard* when it stated that "[t]aken in isolation, Defendant's substance abuse and alleged impulsive personality are not sufficiently substantial to call for leniency." *Wood*, 180 Ariz. at 72, 881 P.2d at 1177. The clear language shows that this Court considered Wood's proffered mitigation, but, as was its prerogative, failed to find that it called for a life sentence.

The record is clear that this Court fulfilled its constitutional obligations by giving consideration to all of Wood's proffered mitigating evidence. The court noted the requirement to consider the statutory mitigating factors "as well as any aspect of the defendant's background or the offense relevant to determining whether the death penalty is appropriate," and addressed each of Wood's proffered mitigating circumstances. *Id.* at 70, 881 P.2d at 1175. In addition, the court went beyond Wood's proffered mitigation to scour the record for any other mitigating information: "Despite close scrutiny, the record discloses no other nonstatutory

mitigating circumstances." *Id.* at 71, 881 P.2d at 1176. The court did not violate *Eddings* by giving Wood's mitigation evidence "no weight by excluding such evidence from their consideration." 455 U.S. at 115. Rather, this Court fulfilled its constitutional obligation by considering Wood's childhood, mental condition, and substance abuse issues as mitigating evidence. "*Eddings* requires nothing more." *Clabourne v. Ryan*, 745 F.3d 362, 373 (9th Cir. 2014).

That this Court, after full consideration, did not find any particular piece of the proffered mitigation proven, weighty, or sufficient to call for a life sentence does not establish a constitutional violation. *See Harris*, 513 U.S. at 512. Because this Court fully considered all of Wood's proffered mitigation and did not impose an unconstitutional causal nexus test to preclude considering any mitigation, Claim One would fail on the merits even if it were properly brought under Rule 32.1(g). Accordingly, this Court should deny Wood's request for a stay of execution and deny his petition for review.

C. *Claim Two.*

In this claim, Wood argued that he is entitled to a new direct appeal because his appellate counsel had a conflict of interest that violated Wood's rights to the effective assistance of appellate counsel and to counsel's undivided loyalty. (Pet., at 28–32.) This Court should deny Wood's request for a stay of execution and

deny his petition for review because he waived this claim and because it would fail on the merits.

1. FACTUAL BACKGROUND.

Before filing the opening brief, Wood's appellate counsel, Barry J. Baker Sipe, moved to withdraw because the agency with which he was to begin employment, the Pima County Legal Defender's Office, had previously represented Debra Dietz. (PFR, Ex. D.) The trial court held a status conference on appellate counsel's motion, and ordered the Legal Defender's Office to provide the court with Ms. Dietz's file for in camera inspection. (Exhibit B.) Then, [p]ursuant to Mr. Baker Sipe's request," the court would "either divulge exculpatory or mitigating material or the file will be sealed and made a part of the court's record." (*Id.*) Nothing in the record indicates that anything further came of this procedure. Then, two days later, the Arizona Supreme Court granted the motion to withdraw. (PFR, Ex. F.) However, likely because the trial court's action resolved the issue, Baker Sipe nonetheless filed the opening brief and represented Wood in the direct appeal. *Wood*, 180 Ariz. 53, 881 P.2d 1158 (listing Baker Sipe of the Pima County Legal Defender as counsel for Wood). Wood did not raise this claim in either of his two prior post-conviction relief proceedings.

2. WOOD WAIVED THIS 20-YEAR-OLD CONFLICT CLAIM.

The district court correctly concluded that Wood waived this claim by failing to bring it in a prior Rule 32 proceeding. Rule 32.2(a)(3) provides that relief is not available for any ground "waived at trial, on appeal, or in any previous collateral proceeding." For claims of "sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim." Comment to Ariz. R. Crim. P. 32.2. This Court has held, however, that a claim of ineffective assistance of counsel may be waived by raising a different allegation of counsel's ineffectiveness in a previous proceeding irrespective of any specific knowing, voluntary, and intelligent waiver:

> For example, if a petitioner asserts ineffective assistance of counsel at sentencing, and, in a later petition, asserts ineffective assistance of counsel at trial, preclusion is required without examining facts. The ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong policy against piecemeal litigation. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002).

Stewart v. Smith, 202 Ariz. 446, 450, ¶ 12, 46 P.3d 1067, 1071 (2002); *see also Spreitz*, 202 Ariz. at 2, ¶ 2, 39 P.3d at 526 ("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. *See State v. Conner*, 163 Ariz. 97, 100, 786 P.2d 948, 951 (1990).") (emphasis in original).

Here, as the PCR court noted, Wood argued several claims of appellate counsel's alleged ineffective assistance of counsel under the Sixth Amendment in his 1996 PCR proceeding. He could have raised the Sixth Amendment conflict-of-interest claim regarding appellate counsel at that time, but failed to do so. Accordingly, that claim is waived. *See Smith*, 202 Ariz. at 450, ¶ 12, 46 P.3d at 1071; *Spreitz*, 202 Ariz. at 2, ¶ 2, 39 P.3d at 526. The trial court thus did not abuse its discretion in dismissing Claim Two, and this Court should deny Wood's request for a stay of execution and deny his petition for review.

3. ALTERNATIVELY, CLAIM TWO IS UNTIMELY AND MERITLESS.

This Court should deny Wood's stay request and petition for review even if the PCR court was incorrect that Wood waived Claim Two by failing to raise it in his first PCR proceeding.

First, Claim Two fails to meet the requirements of Rule 32.2(b), which provides that a successive PCR notice "shall be summarily dismissed" if the petitioner fails to provide reasons for not raising the claim in a previous petition or in a timely manner. Wood's appellate counsel moved to withdraw in March 1992. (PFR, Exs. D, F.) This Court issued its opinion in the direct appeal on October 11, 1994. *Wood*, 180 Ariz. 53, 881 P.2d 1158. Wood does not offer any meritorious reason explaining why he failed to assert Claim Two in either of his previous PCR proceedings, or at any other time during the last two decades. He certainly cannot

argue that he was unaware that the claim existed, since the same appellate counsel who moved to withdraw represented Wood through the direct appeal. Thus, even if it was not waived, Claim two is subject to summary dismissal under Rule 32.2(b) due to Wood's failure to explain his dilatory action.

Second, Claim Two is not cognizable in a successive PCR petition. As with a claim asserting ineffective assistance of counsel, a claim asserting counsel's Sixth Amendment conflict of interest is cognizable under Rule 32.1(a).[7] *See State v. Petty*, 225 Ariz. 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (IAC claims cognizable under Rule 32.1(a)). Thus, because this claim does not fall within Rule 32.1(d), (e), (f), (g), or (h), it may not be brought in an untimely petition and would be precluded as untimely under Rule 32.4(a).

Finally, even if it were not waived and precluded, Claim Two would fail on the merits. To establish a claim of ineffective assistance of counsel based on a conflict of interest, the defendant must demonstrate "1) that an 'actual conflict' existed and 2) that the conflict adversely affected the representation." *State v. Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193 (App. 1993) (citing *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986)). To show that an "actual conflict"

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[7] Rule 32.1(a) applies if "[t]he conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona."

existed, the defendant must demonstrate the existence of an alternative defense strategy that "possessed sufficient substance to be a viable alternative," and that this alternative strategy was "inherently in conflict with the attorney's other loyalties or interests." *Id.* (quoting *State v. Martinez-Serna*, 166 Ariz. 423, 425, 803 P.2d 416, 418 (1990)). Adverse effect is a less burdensome requirement than prejudice, and requires a showing that the attorney's conflict "reduced his effectiveness." *Jenkins*, 148 Ariz. at 467, 715 P.2d at 720. "The negative impact must be substantial although it need not have caused defendant's conviction." *Id.* Finally, a conflict under the rules of professional conduct does not necessarily constitute ineffective assistance of counsel. *Id.*

Although Baker Sipe's representation of Wood likely represented a conflict under the Arizona Rules of Professional Conduct, *e.g.*, Ariz. R. Prof. Conduct 1.9, 1.10, Wood failed to demonstrate an alternative defense strategy that conflicted with Baker Sipe's other loyalties or interests, or any substantial negative impact. *See Jenkins*, 148 Ariz. at 467, 715 P.2d at 720. Wood nonetheless argues that to defend against premeditation, his trial counsel pursued a defense of impulsivity, a claim based in large part on Ms. Dietz's behavior toward Wood, which allegedly "triggered" his impulsivity. (PFR, at 31–32.) He contends that appellate counsel abandoned that defense because it required counsel to criticize Ms. Dietz, and

instead pursued the weaker theory that Wood was insane at the time of the shootings, a contention allegedly unsupported by the evidence. (*Id.* at 32.)

Wood is correct that, at trial, his counsel argued to the jury that the State failed to prove premeditation because he acted impulsively. *Wood*, 180 Ariz. at 62, 881 P.2d at 1167 ("Premeditation was the main trial issue. The defense was lack of motive to kill either victim and the act's alleged impulsiveness, which supposedly precluded the premeditation required for first degree murder."). But he fails to identify any *appellate* issues that Baker Sipe failed to raise due to his office's duty of loyalty to Ms. Dietz. An appellate lawyer does not pursue trial defenses on appeal; Wood's contention that *appellate* counsel abandoned the *trial* defense of impulsivity is illogical. Moreover, Wood's contention that Baker Sipe "chose to argue that Mr. Wood was insane at the time of the shootings," is in fact based on appellate counsel's argument that, because an expert report prepared for sentencing raised issues of insanity, impulsivity, and involuntary and voluntary intoxication, Wood was entitled to a new trial in which the jury had access to those findings as they related to guilt. (Exhibit C.[8]) This argument was not, as Wood now contends, an abandonment of a more viable issue, but rather an argument that the jury should have received additional evidence supporting the lack-of-premeditation defense.

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[8] Exhibit C is an excerpt from Wood's direct appeal opening brief. If this Court requests, the State will provide the entire document.

Accordingly, because Wood has failed to identify any viable alternative appellate issues that Baker Sipe failed to raise due to his office's loyalty to Ms. Dietz, he cannot meet his burden of demonstrating an actual conflict, much less a substantial negative impact on the outcome of his appeal. *See Jenkins*, 148 Ariz. at 467, 715 P.2d at 720; *Padilla*, 176 Ariz. 81, 83, 859 P.2d 191, 193.

Because, in addition to the PCR court's conclusion that Claim Two was waived, it is also precluded as untimely and meritless, this Court should deny Wood's request for a stay of execution and his petition for review.

IV. CONCLUSION.

For all the foregoing reasons, this Court should deny Wood's request for a stay of execution and deny review.

RESPECTFULLY SUBMITTED this 15th day of July, 2014.

Thomas C. Horne
Attorney General

Jeffrey A. Zick
Chief Counsel

/s/
Jeffrey L. Sparks
Assistant Attorney General

Attorneys for Respondent

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