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.	)	
	)	Reply to Response to Petition for Review/
Joseph R. Wood,	)	Motion to Recall Mandate/Motion for Stay
	)	
Defendant.	)	**Execution Scheduled**
_____	)	**July 23, 2014, 10:00 am**

¶1 Mr. Wood's petition for review should be granted. He presents compelling arguments on the merits of his claims. Procedurally, the petition, and the State's opposition, raise a number of issues on which there is no controlling law in Arizona. This Court should stay Mr. Wood's execution so that those issues of first impression may be addressed.

¶2 The State's Opposition to Petition for Review ("Opp.") asks this Court to deny review of Mr. Wood's petition because, the State claims, *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005), was not a clear break from this Court's past practice in its independent review of capital sentences. It also alleges that Mr. Wood's conflict of interest claim should have been raised 20 years ago. Neither of these arguments presents a hurdle to relief, as we explain below.

A. *Anderson* Represents a Significant Change in Arizona Law.

¶3 If *Anderson* was a "clear break from the past" and a "definite break from prior law," the State agrees that Mr. Wood has shown a significant change in the law. *State v. Shrum*, 220 Ariz. 115, 118, ¶ 15, 203 P.3d 1175, 1178 (2009) (internal quotation and citation omitted in first quotation). The State maintains, however, that *Anderson* did not represent such a change. In forwarding this argument, the State ignores the approximately two-dozen capital cases in which this Court declined to meaningfully consider categories of mitigating evidence

because they were not causally connected to the crime. Pet.for Rev. at 18-23. The crux of the State's argument here is that this Court was aware of the rules of *Lockett* and *Eddings* at all times since those decisions were announced and that *Tennard* did not spur any change in this Court's consideration of mitigating evidence in its independent review. Essentially, the State is arguing that this Court did not refuse to consider that evidence based on the lack of a causal connection, but rather that it routinely discounted that evidence to having no weight at all based on its lack of a causal connection. Opp. at 10-12. But there is no difference between these two approaches. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("our cases had firmly established that sentencing juries must be able to give *meaningful consideration* and effect to *all* mitigating evidence") (emphasis supplied). The State has not identified one case in the entire history of this Court's pre-*Anderson* jurisprudence in which non-causally connected social history mitigation evidence was found to have any meaningful weight. The fact remains that pre-*Anderson* this Court routinely rejected non-causally connected social history mitigation, declining to award it any meaningful weight. The unbroken line of cases demonstrates this Court's decisions were not based on lack of proof or the substance of the mitigation, but instead based on the type of mitigation.

¶4 As the United States Supreme Court has explained, it is immaterial whether this results from a statute, rule or any other type of barrier. *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (citations omitted) (quoting *Eddings*, 455 U.S. at 117, n.* (O'Connor, J., concurring)) ("it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute…; by the sentencing court…; or by an evidentiary ruling,…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.'). The State points out that this Court cited *Lockett* in finding Arizona's capital sentencing statute unconstitutional in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978). Opp. at 10. The State further notes that the statute was amended to require consideration of "'any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.'" Opp. at 10, citing A.R.S. §13-703(g). While this is true, it did not prevent this Court from erecting a barrier to the consideration of non-causally connected social history evidence. It simply defined that type of evidence as irrelevant, or having no significant weight.

¶5

Despite this Court's awareness of *Lockett* and *Eddings*, in Mr. Wood's case, this Court defined non-causally linked social history evidence as not mitigation at all. After discussing Mr. Wood's impulsive personality, history of substance abuse, duress, and foreseeability of grave risk of death as potential nonstatutory mitigation, this Court concluded that "the record discloses no other nonstatutory mitigating circumstances." *State v. Wood*, 180 Ariz. 53, 72, 881 P.2d 1158, 1174 (1994). This statement speaks for itself and demonstrates that at the time this Court conducted its independent review of Mr. Wood's death sentence, it did not consider his dysfunctional family background as nonstatutory mitigation.

¶6 It is further instructive to hone in on the cases surrounding Mr. Wood's direct appeal decision filed October 11, 1994. In *State v. Styers*, 177 Ariz. 104, 865 P.2d 765 (1993), this Court "imposed a test directly contrary to the constitutional requirement that all relevant mitigating evidence be considered by the sentencing body" when it applied a "type of nexus test to conclude that Styers' post traumatic stress disorder did not qualify as mitigating[.]" *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008). In *State v. Williams*, 183 Ariz. 368, 904 P.2d 437 (1995), this Court "imposed a 'nexus' requirement contrary to *Eddings*, *Lockett*, *Tennard*, and *Smith*" "[b]y holding that 'drug use cannot be a mitigating circumstance of any kind' unless Williams demonstrated 'some impairment at the time of the

offense[.]'" *Williams v. Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010). The direct appeal decision in *Styers* was issued on December 21, 1993. Mr. Williams's direct appeal decision was issued September 26, 1995. Accordingly, not only is there a twenty-year history of causal connection requirements in this Court's decisions, but there is stark evidence this Court did not apply *Lockett* and *Eddings* ten months before and eleven months after the October 11, 1994 decision in Mr. Woods' case.

¶7 The only potential evidence the State can muster in response to the overwhelming jurisprudential history in Mr. Wood's favor are three cases that have no bearing on this question. Mr. Wood has already addressed *State v. Gonzales*, 181 Ariz. 502, 892 P.2d 838 (1995), in his petition for review. PR at 8-9. Second, in *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982), this Court afforded substantial weight to the *statutory* mitigating factor of age. The defendant was sixteen at the time of the crimes. *Id*., at 251. The State fails to explain how the fact that this Court applied a statutory mitigating factor in a case also applies to cases where it did not find or consider non-statutory mitigating factors. Finally, in *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d (1983), this Court reiterated the principle of *Lockett* and *Eddings* which, as we have explained, did not prevent this Court from discounting non-causally connected social history mitigation to irrelevance. This Court did not correctly apply *Lockett* or *Eddings* to non-causally connected

mitigation in *McMurtrey*, but instead stated that a defendant may offer evidence of "a difficult family history" to establish the (G)(1) *statutory* mitigator. 136 Ariz. at 102. Of course, (G)(1) has a built-in causal connection requirement, so it is unsurprising that the Court would consider that category of evidence to be mitigating. A.R.S. § 13-703(G)(1).

¶8 The State's position that "this Court has used a causal nexus analysis to assess the *weight* to be given to mitigating evidence" but not as a categorical exclusion is not convincing. There is no difference between a court excluding evidence from consideration on the one hand, and a court defining a category of evidence as always lacking in weight. The cases cited by the State affirm this point. In *State v. Sansing*, this Court held the defendant did not establish nonstatutory mitigation of any weight because he did not prove a causal connection. 206 Ariz. 232, 239, ¶¶ 26-28, 77 P.3d 30, 37 (2003). In *State v. Jones*, this Court defined mitigating evidence as being entitled to no weight because it was not causally connected. In *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920 (1983), this Court simply reiterated the *Lockett/Eddings* principle. While the Court has recited the *Lockett/Eddings* principle, there is no case between the 1980s and 2005, where this Court afforded a capital defendant's non-causally connected social history

mitigation substantial weight.[1] In keeping with this line of cases, this Court failed to acknowledge Mr. Wood's traumatic childhood as nonstatutory mitigation. 180 Ariz. at 72, 881 P.2d at 1174, *discussed supra*. That is a barrier to meaningful consideration and Mr. Wood urges this Court to correct the constitutional error in this case.

¶9 The State claims *Tennard* "involved a garden-variety application of *Eddings*' general principle to a new fact pattern" and should not have come as a surprise to any court aware of the United States Supreme Court's Eighth Amendment jurisprudence. Opp., at 12-13. That certainly should be true. Nevertheless, this Court's history shows it routinely discounted non-causally connected social history holding it was not mitigating and had no weight. The State's assertion that the causal connection requirement was simply a means of assessing the weight of the mitigation is incorrect because the Court assessed no weight to the evidence.

¶10 In a footnote, the State points out that no other jurisdiction has found that *Tennard* or *Anderson* established a new rule of constitutional law. Opp. at 13, n.3.

---

[1]To be clear, this is not to argue that a sentencer must assign substantial, or any particular amount of, weight to mitigation. It is to point out that, if this Court were giving meaningful consideration to non-causally connected social history mitigation, it is incredible that not one case during that time period presented this type of mitigation that warranted something more than no or inconsequential weight.

The *Tennard* decision was correcting the Fifth Circuit's misapplication of the law which, like this Court, was requiring a causal connection between mitigation and the offense. Petitioner has not argued that *Anderson* established a new rule in any other jurisdiction. He argues it established a new judicial rule in Arizona. The State does not explain why we would expect any other jurisdiction to make a finding on this issue.

¶11 The State disputes that the Ninth Circuit's decision in *McKinney v. Ryan*, No 09-99018 (9th Cir.), will have any relevance to Mr. Wood's case because "the issue there is whether this Court complied with *Eddings* and *Tennard* when it evaluated McKinney's mitigating evidence[.]" *Id*. at 13, n.4. This Court decided McKinney's direct appeal in May, 1996. Similar to the comparison with *Styers* and *Williams* above, if the Ninth Circuit determines this Court applied an unconstitutional causal connection requirement at that time, this is powerful evidence that it also did so in Mr. Wood's case just over a year and a half earlier. Moreover, an *amicus* brief has been accepted in *McKinney* which informs the Ninth Circuit that this Court's error was not isolated to that case, but instead that it followed its judicial causal connection rule in many capital cases during the relevant time period. *McKinney v. Ryan*, Brief of *Amicus Curiae* Office of the Federal Public Defender for the District of Arizona in Support of Petitioner-appellant James E. McKinney (Apr. 9, 2014).

As a party to that case, the State should know its representation that the broader question raised here will not be addressed in McKinney is simply untrue. Even if the *amicus* brief had not been filed, the broader issues are likely to be addressed. Fed.R.Civ.P. 35 ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless. . .en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or. . .the proceeding involves a question of exceptional importance).

¶12 The State asserts that the superior court's ruling dismissing the petition could also have been based on untimeliness because Mr. Wood could have filed a postconviction petition in 2005. Opp. at 14, n.5. The State claims that Rule 32.2(b) imposes a time limit on petitions for postconviction relief. It does not. Mr. Wood did explain why he had not raised the *Anderson* claim in a prior petition: because *Anderson* had not been decided during the time that Mr. Wood's previous postconviction petitions were pending. The State has not disputed this point. Rule 32.2(b) requires nothing more. Its requirement of raising a claim "in a timely manner" refers to the only timeliness requirement contained in the rules: Rule 32.4(a) and (c). There is no other timeliness requirement in the rules. If a timeliness requirement were applied to Mr. Wood, it would violate due process to apply it without any notice of what that time limit is. Further, even if an unwritten

time limit for successive petitions exists, this Court must grant review to consider whether Mr. Wood was required to file his successive petition while his case was pending in the federal courts. Such a rule, requiring simultaneous litigation in criminal cases, has never been announced in Arizona and Mr. Wood is aware of no such rule. The State has not addressed the existence of such a rule in its opposition; it has only assumed one to exist. This issue of first impression, which will impact countless criminal defendants, particularly in capital cases, requires a stay of execution, argument and briefing.

B. Mr. Wood Is Entitled to Relief on His *Lockett*/*Eddings* Claim.

¶13 As explained above, the State's position that this Court followed the law established by *Lockett* and *Eddings*, 455 U.S. 104 (1982), from the time of those decisions is not supported by this Court's jurisprudence. The State fails to address any of the two dozen cases cited in the petition for review which contradict its argument. The State concludes that "the Arizona Supreme Court has faithfully complied with *Eddings*' holding by requiring consideration of all relevant proffered mitigation in capital sentencing." Opp., at 15, *citing Eddings v. Oklahoma*, 455 U.S at 113-14. This does not address the problem Mr. Wood raised, which is that this Court defined most, if not all, social history mitigation as not relevant and blocked it from consideration in the capital sentencing

determination. So, while this Court endorsed the general principle that all relevant mitigating evidence must be considered, it negated that rule by simply defining some categories of mitigating evidence as not relevant.

¶14 In Mr. Wood's case, this Court applied a judicial rule requiring a causal connection for social history mitigation. While the State claims this Court "determined how much weight [each] mitigating circumstance carried" in this case, Opp. at 15, it did not do so in the way that Eighth Amendment requires: by giving meaningful consideration to the social history evidence.

¶15 The State then posits that there could be no *Anderson* violation because this Court "reviewed the entire record for mitigating circumstances." Opp. at 30, *citation omitted*. However, this review did not prevent the Court from violating *Eddings* and *Lockett*, because it did not consider non-causally connected evidence mitigating at all. That is, this Court has taken the position that the two rules are not mutually exclusive. Specifically, it could review the entire record for mitigation and decline to meaningfully consider and give full effect to dysfunctional family background as mitigating evidence. In the eyes of the Eighth Amendment, this is constitutionally insufficient.

¶16 The State emphasizes that this Court did not *exclude* the dysfunctional family evidence and claims that this evidence was *considered*. Opp. at 16. But, as

discussed above, this Court made clear that Mr. Wood's traumatic childhood did not constitute nonstatuory mitigation in its eyes. 180 Ariz. at 72, 881 P.2d at 1174. Further, the Eighth Amendment requires *meaningful* consideration. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."); *Schriro v. Landrigan*, 550 U.S. 465, 486 (2007) ("For a capital defendant, the right to have the sentencing authority give full consideration to mitigating evidence that might support a sentence other than death is of paramount importance."). Considering evidence just long enough to reject it as irrelevant is not meaningful consideration. The sentencer—this Court, in this case—must be able to appreciate the mitigating significance of the evidence and give it effect; not merely recognize that the evidence is before it and then eject it from the sentencing calculus. *See generally Abdul-Kabir*, *supra*.

¶17 The State's insistence that this Court meaningfully considered the dysfunctional family evidence is flatly contradicted by the Court's own language: "Defendant failed, moreover, to demonstrate how his allegedly poor upbringing

related in any way to the murders." *State v. Wood*, 180 Ariz. 53, 70-72, 881 P.2d 1158, 1175-77 (1994). For two reasons, there is no question this statement reveals the Court was following its causal connection rule that contravened *Lockett* and *Eddings*. There are two reasons. First, immediately after the quoted statement and for precedential support, the Court cited *State v. Wallace*, for the proposition that, for evidence to be mitigating, there must be a link between it and the offense. 160 Ariz. 424, 426-27, 773 P.2d 983, 985-86 (1989). In *Wallace*, the Court demonstrated that it followed the nexus requirement by stating: "A difficult family background, in and of itself, is not a mitigating circumstance. If it were, nearly every defendant could point to some circumstance in his or her background that would call for mitigation." Id. at 427, 773 P.2d at 986. Second, the Court concluded by listing the only non-statutory mitigation it had given any weight: Mr. Wood's "substance abuse and alleged impulsive personality." *State v. Wood*, 180 Ariz. at 72, 881 P.2d at 1177. It did not include dysfunctional family in that list, demonstrating that it did not consider or give weight to that category of mitigation.

¶18 The State further argues this Court actually rejected the dysfunctional family mitigation because it was not proven. Opp., at 16. This is also plainly contradicted by the record. At sentencing, the State did not rebut or cross-examine any of the sentencing evidence trial counsel elicited. Moreover, this Court conceded there

was evidence that Mr. Wood's father was an alcoholic. 180 Ariz. at 72, 881 P.2d at 1177. In itself, this is the type of evidence that might have made a difference at sentencing if properly considered because it may have moved a sentencer to life. *See e.g. Porter v. McCollum*, 558 U.S. 30, 37, 130 S.Ct. 447, 451 (2009) (reversing circuit court's denial of habeas relief on capital petitioner's ineffective assistance of counsel claim for failing to present mitigating evidence of family background, mental health, and military service; disapproving of the state postconviction court's discounting of nonstatutory mitigating evidence of childhood abuse because petitioner was 54 years old at the time of his trial; emphasizing that such evidence "might well have influenced the jury's appraisal of [Porter's] moral culpability.") (quoting Williams (Terry) v. Taylor, 529 U.S. 362, 398. 120 S.Ct. 1495 (2000)); *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934 (1989) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable'"). The record also contained evidence, which this Court ignored in its decision, that Mr. Wood's father beat his son with a belt and was verbally abusive to the family when he drank. Pet., Ex. C at 2. This Court's lack of consideration of family dysfunction does not negate that it is precisely the type of evidence that a sentencer, when giving it full effect, may

rely on in concluding that death is not the appropriate sentence. *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003).

¶19 The State misses the point of Mr. Wood's citation to this Court's statement that "Defendant's substance abuse and alleged impulsive personality are not sufficiently substantial to call for leniency." *State v. Wood*, 180 Ariz. at 72, 881 P.2d at 1177. This sentence demonstrates that this Court did not, contrary to the State's assertion, recognize the dysfunctional family history as mitigating but simply gave it minimal weight. Had it given the factor even minimal weight, it would have included the dysfunctional family mitigator in this calculus. Instead, the Court's language reveals that the only nonstatutory mitigation in this Court's assessment were substance abuse and impulsive personality.

¶20 The State also asserts that this Court "went beyond Wood's proffered mitigation to scour the record for any mitigating information[.]" Opp., at 17. This Court's statement, that it conducted such a review, does not demonstrate, that it considered non-causally connected mitigation. For example, this Court in its review did not mention the relevant, weighty mitigating factor of honorable service to our country in Mr. Wood's Air Force records, which were part of the record in this case. *Porter v. McCollum*, 130 S.Ct. at 455 (when evaluating mitigation,

Florida Supreme Court should not have discounted defendant's military service to this country).

¶21 Because this Court failed to give meaningful consideration and full effect to Mr. Wood's mitigating evidence based on its causal connection requirement, this Court should vacate the sentences of death and order a new sentencing proceeding.

C. Mr. Wood Has Never Waived His Conflict of Interest Claim.

¶22 The State asserts that Mr. Wood "wait[ed] 20 years to raise" his conflict claim. Opp., at 7. Even if this were the case, the State can point to no provision in Arizona law that sets a time limit for raising claims in successive postconviction petitions. Instead, Arizona law bases preclusion on the requirement that claims be raised in the first proceeding in which they are available. Ariz.R.Crim.P. 32.1(a). If this Court intends to create a time limit, it should stay Mr. Wood's execution, allow full briefing on the issue, and announce that rule. This Court would then need to decide whether that rule could fairly be applied to Mr. Wood, in whose case it was being announced for the first time. If this court instead chooses to follow the rule that waiver is a matter of raising a claim in the proceeding in which it is first available, it should ignore the State's protestations regarding the passage of time and determine whether Mr. Wood has demonstrated that he has never made a knowing, voluntary, and intelligent waiver of his conflict of interest claim.

¶23 Although it failed to make this argument below, the State adopts the trial court's holding that *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 12, 46 P.3d 1067, 1071 (2002), precludes application of the sufficient constitutional magnitude exception. Opp., at 20. As we explained in the petition for review, however, that would require this Court to announce that raising a claim of ineffective assistance of counsel precludes a defendant from raising any other Sixth Amendment claim, such as a conflict of interest. *Smith* did not address or decide this point and, as far as we are aware, this Court has never done so. Again, should this Court consider applying such a rule, it should do so after full briefing and argument, which require a stay of Mr. Wood's execution. If this Court rejects the State's request to apply such a new rule in Mr. Wood's case, it should remand for a decision on the merits of the conflict claim. The State has not disputed that a conflict of interest existed; that this is the type of claim that requires a knowing, voluntary, and intelligent waiver; and that Mr. Wood never made that waiver. In fact, he expressly declined to waive it.

¶24 Alternatively, the State asks this Court to find the conflict claim untimely based on 32.2(b). This provision does not apply to Mr. Wood. His conflict of interest claim is not raised under 32.1(d)-(h). It is only by relying on those exceptions to preclusion that the requirement is triggered that a defendant provide

grounds for not raising his claim in a previous petition. Mr. Wood, on the other hand, concedes that his claim does not fall into one of those categories. Instead, the exception he asserts here is that because the claim is one of sufficient constitutional magnitude, it cannot be waived by anything less than a personal waiver. For the same reason, initial postconviction counsel's ineffective assistance in failing to raise appellate counsel's conflict is insufficient to waive and preclude it. Nowhere does the sufficient constitutional magnitude exception require a basis for failing to previously raise the claim. It would be illogical to require a defendant to justify not raising something that the State has a heavy burden to prove he affirmatively waived.

¶25 In any event, Mr. Wood has asserted this claim since his federal petition for writ of habeas corpus. Mr. Wood moved to dismiss any unexhausted claims (of which the conflict claim was found to be one) from his federal habeas petition and stay those proceedings, to allow him to litigate the claims in state court. *Wood v. Ryan*, No. 98-cv-00053 Supplemental Motion to Dismiss Unexhausted Claims (D.Ariz. March 26, 2001); *Rose v. Lundy,* 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982) (recognizing doctrine of comity disfavors simultaneous litigation in state and federal court). That motion was denied, *at the State's urging*. *Id*, Dkt. 53 and

54. The State should not be heard to complain that Mr. Wood did not raise his claim in state court sooner when it opposed that very thing thirteen years ago.

D. Appellate Counsel's Conflict of Interest Requires Relief.

¶26 The State concedes that Mr. Wood's appellate counsel suffered from a conflict of interest. Opp., at 23. The State further concedes that Mr. Wood need not show prejudice, but rather only that the conflict had an adverse effect on the representation. *Id*. The State asserts that Mr. Wood failed to "demonstrate an alternative defense strategy that conflicted with [appellate counsel's] other loyalties or interests, or any substantial negative impact." *Id*. Mr. Wood did exactly that. PR at 31-32. He is also able to identify the issues that appellate counsel's conflict prevented him from raising: insufficiency of the evidence of premeditation and additional, nonstatutory mitigation based on this evidence. In these ways, unconflicted counsel would have presented a case for life—either by way of second-degree murder or a reduction to life sentences through independent review—for Mr. Wood in his direct appeal. Instead, appellate counsel argued insanity even though, as explained in the petition for review, no expert found Mr. Wood insane at the time of the crimes and there was no evidence to support such an opinion or argument. Pet.for Rev., at 32; Ex. A-C. *See State v. Martinez-Serna*, 166 Ariz. 423, 425-26, 803 P.2d 416, 418-19 (1990) (defendant entitled to relief

where conflict removed possibility of alternative defense, leaving counsel with implausible one).

¶27 The State's puzzling statement that Mr. Wood cannot show adverse effect because "[a]n appellate lawyer does not pursue *trial* defenses on appeal" and thus the "contention that *appellate* counsel abandoned the *trial* defense of impulsivity is illogical" is meritless. Of course appellate lawyers rely on evidence, strategies and arguments just as trial lawyers do. They abandon some and adopt others. American Bar Association's Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases (2003), Comment to Guideline 10.15.1 ("it is of critical importance that counsel on direct appeal proceed…in a manner that maximizes the client's ultimate chances of success"). As long as that decision is a sound strategic one, it complies with the Sixth Amendment. If it is one constrained by loyalty to another, it is not. That is what occurred in this case.

¶28 Contrary to the State's contention that appellate counsel only indirectly focused on a non-existent insanity defense, the Opening Brief argued that defense in at least three distinct claims. *State v. Wood*, No. CR-91-0233-AP Opening Brief, at 43, 47, 79-82. (Ariz.Sup.Ct. June 1, 1992). First, as the State points out, appellate counsel argued insanity in the context of defense counsel's failure to present an insanity defense to the jury through an expert. *Id*. at 43. Then, appellate

counsel argued trial counsel was ineffective in not supporting an insanity defense with hospital records and interviews of expert witnesses. *Id.* at 47. Lastly, appellate counsel argued that Mr. Wood's insanity should preclude a sentence of death. *Id.* at 79-82. There was thus significant and repeated reliance on the insupportable insanity theory in the Opening Brief, to the exclusion of the theory that the actions of Ms. Dietz were a factor in Mr. Wood actions on the day of the crimes.

¶29 Critically, as the State concedes, Mr. Wood need not show that he likely would have prevailed in his direct appeal absent appellate counsel's conflict, or even that a different result was probable or possible. Opp. at 23 (discussing "reduced...effectiveness" and "negative impact" that is "substantial") (citations and internal quotations omitted). He has made that showing here and this Court should grant relief on the merits of this claim or, in the alternative, remand to the lower court for a determination of the merits in the first instance. In either case, a stay of execution is required.

E. Conclusion

¶30 If Joseph Wood is to be executed, it must be in accordance with the United States Constitution and Arizona's Rules of Criminal Procedure. The petition for review raises a number of issues of statewide importance and first impression in criminal postconviction cases. They are central to Mr. Wood's case as well. He has

demonstrated that his claims are not precluded or, at minimum, that important questions must be addressed by this Court before that determination can be made. This Court should grant the motion for stay of execution and decide those issues in due course.

Respectfully submitted this 16th day of July, 2014.

s/*Julie S Hall*
Counsel for Mr. Wood

Copy of the foregoing e-mailed
this 16th day of July, 2014, to:

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

Julie S Hall