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Attorneys for Petitioner

BEFORE THE CIRCUIT JUDGE
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph R. Wood, III,	)	No. 08-99003
	)	
Petitioner/Appellant	)	Petition for Writ of Habeas Corpus
	)	and Motion for Stay of Execution
v.	)	
	)	Hon. Kim McLane Wardlaw
Charles L. Ryan, et al.	)	
	)	**Capital Case**
Respondents/Appellees.	)	**Execution Scheduled**
_____	)	**July 23, 2014, 10:00 am**

Emergency Motion Under Circuit Rule 27-3(b)
Action Needed Prior to July 23, 2014

Circuit Rule 27-3 Certificate

1. Attorneys for Mr. Wood:

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2. Facts showing existence and nature of claimed emergency: The State of Arizona has issued a warrant for Mr. Wood's execution on July 23, 2014, five days from today.

3. Opposing counsel have been notified of this motion by e-mail and will be served by ECF contemporaneously with the filing of the motion.

1. This Court's jurisdiction is invoked pursuant to its authority under 28 U.S.C. § 2241 to grant a writ of habeas corpus and the All Writs Act, 28 U.S.C. § 1651(a). Mr. Wood is currently in state custody under a sentence of death. Respondents are Charles Ryan, Director of the Arizona Department of Corrections, and other Arizona prison officials currently holding Mr. Wood.

2. This petition is properly presented to Your Honor as a Circuit Judge of the United States Court of Appeals for the Ninth Circuit. Under 28 U.S.C. § 2241(a), a circuit judge may issue a writ within his or her respective jurisdiction. Arizona is within the Circuit Judge's jurisdiction. *See Bowen v. Johnston*, 55 F.Supp. 340, 341 (N.D.Cal. 1944) (circuit judge's jurisdiction to issue writ exists within states of judge's circuit). Transfer to a panel of the Ninth Circuit under Circuit Rule 22-4 is inappropriate because, by its express terms, that rule applies only to claims raised in authorized second or successive petitions under 28 U.S.C. § 2254 or 2255 motions. Transfer to a panel is further prohibited by 28 U.S.C. § 2241, as explained in the contemporaneously-filed memorandum in support of this petition. Because panels are not authorized to hear petitions pursuant to § 2241, transfer under Circuit Rule 22-2 is also prohibited.

3. The claim raised in this petition is fully exhausted under 28 U.S.C. § 2254, to the extent that provision applies at all to this petition, which we do not concede.

This claim raised in this petition for writ of habeas corpus relief was exhausted by the Arizona Supreme Court's independent review of Mr. Wood's death sentences in his direct appeal. 28 U.S.C. § 2254(b)(1)(A). The claim was also presented to the Arizona courts in state post-conviction and through a motion to recall the mandate.

STATEMENT OF REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

4. As required by 28 U.S.C. § 2242, Mr. Wood states that he has not applied to the district court because it is the integrity of this Court's rulings which is at issue in this petition. In addition, this petition and motion do not require fact finding, including discovery and evidentiary development through a hearing. This Court is thus the most appropriate venue to resolve this claim.

5. Exceptional circumstances warrant the exercise of this Court's jurisdiction, and adequate relief cannot be obtained in any other form. The Supreme Court defines exceptional circumstances as "those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." *Bowen v. Johnston,* 306 19, 27 (1939). Exceptional circumstances have arisen in this case in two ways. First, an *en banc* panel of the Ninth Circuit is set to decide in *McKinney v. Ryan*, No. 09-99018 (9th

Cir.), the very issue raised here. If a stay is not granted, Mr. Wood may be executed next week, "in violation of fundamental constitutional principles" before that decision issue. *Stokley v. Ryan*, 704 F.3d 1010, 1011 (9th Cir. 2012) (Reinhardt, J., dissenting from denial of *en banc* rehearing).

6. As we explain further below, yet another exceptional circumstance exists. The Arizona Supreme Court has refused to address this fundamental error which infected its capital jurisprudence for over twenty years, including in this case. In *State v. Styers*, 254 P.3d 1132 (Ariz. 2011) ("*Styers III*"), however, the same court created a never-before-used procedure to prevent that error from resulting in a *life sentence* from the enforcement of the Great Writ. That Court has now refused to use that same power in this case, where it would have resulted in a *death sentence* being vacated, despite that it was aware this Court may soon hold that the Arizona Supreme Court committed that same error in a large number of cases, including Mr. Wood's. The Arizona Supreme Court nonetheless defiantly refuses to recognize, much less correct, that error *unless the error correction is used to select for death over life*, as it was in *Styers III*. As we explain further below, the Arizona Supreme Court's entrenched resistence to applying *Eddings* and *Tennard* in cases like Mr. Wood's, unless it is to prevent a life sentence, demands the exercise of the Great Writ.

FACTS

7. During the penalty phase of his capital trial, Joseph Wood presented important and substantial 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.*

8. 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.

9. 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.

10. 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.

11. 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.

12. The Arizona Supreme Court subsequently affirmed Mr. Wood's convictions and sentences. Despite all of the known mitigating evidence, this Court refused to

consider an important category 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).

CLAIM FOR RELIEF

The Arizona Supreme Court Unconstitutionally Rejected Mitigating Evidence in Affirming Mr. Wood's Death Sentences by Applying a Causal Connection Test.

13. In its opinion rejecting Mr. Wood's direct appeal, the Arizona Supreme 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.*

State v. Wood, 881 P.2d 1158, 1177 (Ariz. 1994) (citation omitted) (emphasis added). This causal connection requirement violated Mr. Wood's Eighth and Fourteenth Amendment rights to an individualized consideration of all of the mitigating evidence in support of a life sentence.

14. Beyond the Court's plain language, other points in the opinion support this conclusion. First, after discussing Mr. Wood's impulsive personality, history of substance abuse, duress, and foreseeability of grave risk of death as potential

nonstatutory mitigation, the Court concluded that "the record discloses no other nonstatutory mitigating circumstances." *Wood*, 881 P.2d at 1174. This statement 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. Second, the Arizona Supreme 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). Had the Court given the dysfunctional family history factor even minimal weight, it would have included that mitigator in this calculus. Third, immediately after the causal connection 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. In failing to recognize that social history is indeed significant and important mitigation even

when not causally connected to the crime, the Arizona Supreme Court committed its oft-repeated error of violating the Eighth Amendment.

15. 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*, 951 P.2d 869 (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 would be deemed relevant for consideration in the weighing and balancing of mitigation against aggravation. These relevancy limitations violate the Eighth and Fourteenth Amendments. *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 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*, 542 U.S. at 284-285.

16. 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., at 4-5 (quoting *Lockett*,438 U.S. at 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., at 115-116.

17. In Mr. Wood's capital sentencing and appeal, the Arizona Supreme 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). The Arizona Supreme 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. That 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. *Wood*, 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. The 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, the Arizona Supreme Court excluded it from meaningful

consideration.[1]

18. 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*, 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). The Arizona Supreme 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.

19. The Arizona Supreme Court long-required that before evidence of a mental illness may be considered relevant mitigation, a defendant must establish through expert testimony that the mental illness had 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." *State v. 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.*

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

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.* This is the same case the Arizona Supreme Court relied on in Mr. Wood's appeal when refusing to consider his proffered and substantial mitigation.

20. The pattern of the state court's error was consistent over decades of reviewing capital sentences. *See e.g., 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).

21. 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).

22. This Court has already granted habeas relief in two Arizona cases on the basis of this error. *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008) ("*Styers II*") ("[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 [in *Styers I*] 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*."). These cases are particularly instructive in Mr. Wood's case, whose direct appeal decision was filed October 11, 1994. The Arizona Supreme Court decided *Styers I* on December 21, 1993; ten months before the *Wood* opinion was issued.

Mr. Williams's direct appeal decision was issued September 26, 1995, eleven months after that in *Wood*. Accordingly, not only is there a twenty-year history of causal connection requirements in the Arizona decisions, but there is stark evidence that Court did not properly apply *Lockett* and *Eddings* shortly before and after this case was decided.

23. The error requires relief because it is a structural error. The 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.

24. The 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").

25. 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.

26. In addition, the fact that an *Eddings* error is structural is evidenced by 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 continued to reverse and remand capital cases—either from direct review or habeas proceedings—without any assessment of harmlessness when it determined that the state courts imposed an unconstitutional restraint on relevant mitigating evidence.[2] This Court should follow Supreme Court precedent and hold that the causal connection error was structural and requires a new sentencing proceeding.

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

27. 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 and alcoholism, 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*, 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 to call for leniency'"). When sentencers 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 the Arizona Supreme 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.

EXCEPTIONAL CIRCUMSTANCES

28. The Ninth Circuit is prepared to address this very error by the very same state court, 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, just over eight weeks from today. Should Mr. McKinney prevail on the broader question of whether the Arizona Supreme Court established a judicial causal connection rule in the early 1980s, and followed it in capital cases until *Tennard*, Mr. Wood's capital sentences will be demonstrated to be invalid. Without a stay of execution, Mr. Wood will not survive to the date of this Court's decision.

29. Mr. Wood presented this claim to the state courts in a petition for postconviction relief under Ariz.R.Crim.P. Rule 32, *et seq*. The Pima County Superior Court held that the Arizona Supreme Court never established a causal connection requirement and, therefore, did not change Arizona law after *Tennard* was decided. *State v. Wood*, No. CR-28449 Ruling (PimaCty.Super.Ct. July 9, 2014), attached as Ex. K. Without comment, the Arizona Supreme Court declined

to grant review of that decision or afford Mr. Wood a stay of execution until this Court's decision in *McKinney* is available. *State v. Wood*, No. CR-14-0223-PC Order (Ariz.Sup.Ct. July 17, 2014), attached as Ex. L.

30. The Arizona Supreme Court's refusal to review Mr. Wood's *Tennard* claim or stay his execution on that basis is unsurprising given its outright disdain for this Court's prior decisions correcting the same error. That Court responded with scorn to the habeas grant in *Styers II*. During oral argument before that Court following the grant of habeas relief here, Justices considered their views of this Court's holding regarding the Arizona Supreme Court's causal connection requirement:

> Justice Bales: What do you think we should do if we think the Ninth Circuit either misread our opinion in *Styers* or if we disagree with the Ninth Circuit's interpretation of *Eddings*? Just nothing? * * * I think what the Ninth circuit, you know, it read *Eddings* in a broad way, to suggest that, by our not saying we're giving weight to particular mitigation evidence, we had violated Mr. Styers's Eighth Amendment right. And that evidence was certainly before this Court, it wasn't as if it was excluded and the Court was able to give it whatever weight or no weight if it thought that appropriate.
>
> * * *
>
> CJ Berch: But what if we thought that was sloppy writing; that we thought we really meant it when we said we considered all proffered mitigation and we just have a sloppy sentence in there that said "however"?
>
> * * *
>
> VCJ Hurwitz: Let's assume for a second that the Ninth Circuit was

> spectacularly wrong; that it was demonstrably wrong; it's decision was just stupid; aren't we just stuck with it? I happen to think that the Ninth Circuit decision wasn't correct. . .
>
> * * *
>
> VCJ Hurwitz: The State has come to us and said. . .we're asking you to correct this alleged error.
>
> * * *
>
> VCJ Hurwitz: And they've identified the error, which is we didn't–in their view–sufficiently weigh the PTSD testimony. . .
>
> * * *
>
> VCJ Hurwitz: If we said to the Ninth Circuit, you're just wrong. . .you're just wrong, even though none of us were here 20 years ago when this case came up. We've read the same piece of paper you've read, and we're pretty sure you've just got it wrong.
>
> * * *
>
> VCJ Hurwitz: If all you want us to do is say that the Ninth Circuit was wrong, I bet you we can get you a unanimous opinion on that.
>
> * * *
>
> VCJ Hurwitz: Am I right in asking that you made precisely this argument to the federal court and they didn't buy it? Mr. Zick: Yes. VCJ Hurwitz: Incorrectly, perhaps, but. . .

State v. Styers, No. No. CR-90-0356-AP Audio/Video Recording of Oral (June 1, 2011), available at http://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx (last visited

July 18, 2014).

31. In its subsequent opinion, the Arizona Supreme Court "disagree[d] with [this C]ourt's reading of [its] opinion in Styers[.]" *Styers III*, at 1135. The dissent opined that this Court's holding created a "procedural morass" and "[l]ike the majority. . .question[ed] whether the Ninth Circuit correctly decided this case." *Id*., at 1136 (Hurwitz, VCJ, dissenting). The dissent referred to the holding in this case as identifying a "purported constitutional error. . .." *Id*., at 1137. The dissent appeared to speak for the entire Court when it concluded: "[t]he procedural difficulties in this case have been caused by what we believe to be an erroneous decision by the Ninth Circuit." *Id*.

32. The Arizona Supreme Court determined that Mr. Styers's case was still final on direct review. *Id*., at 1133-34. Nonetheless, it created and engaged in a process to correct its *Tennard* error, committed in 1994, to avoid this Court's order that Mr. Styers would receive a life sentence if the error were not addressed. *Id*., at 1134 ("Although independent review is normally conducted in an appeal from a death sentence, nothing in § 13–755 limits our review to direct appeals. Instead, for murders committed before August 2002, the statute imposes an obligation on this Court to 'review all death sentences.'")(citations omitted).[3]

[3]The constitutionality of the Arizona Supreme Court's most recent decision in *Styers* (*Styers III*) is currently at issue before a panel of the Ninth Circuit. *Styers v. Ryan*, No. 12-16952 (9th Cir.).

33. In Mr. Wood's case, however, the Arizona Supreme Court failed to correct its 1995 *Tennard* error–even though its opinion in *Styers III* determined it has the authority to do so in cases which are, in its opinion, long final on direct review. This inequity creates the exceptional circumstance: the Arizona Supreme Court will exercise its power through the special mechanism it created in *Styers III* to correct a *Tennard* error only to avoid a life sentence; not if it could result in vacating a death sentence. This biased, outcome-determinative practice, applied with the aim of upholding death sentences rather than applying the law fairly to all capital defendants, shocks the conscience.

34. The ordinary safeguards of state and federal collateral review have broken down here because the Arizona Supreme Court refuses to recognize its *Tennard* errors. Under the ordinary strictures of federal habeas, it is not a federal court's role to intervene merely because it disagrees with a state court's disagreement with the federal court's holdings. Here, though, the state court has gone beyond forcefully rejecting this Court's opinions, which is its prerogative. Rather, the Arizona Supreme Court decided it had a particular power in cases containing *Tennard* errors and already final on direct review. That could even have, arguably, been its prerogative. But when it chooses to wield that power only in favor of death, the exceptional use of the original writ is necessary to correct the injustice.

THIS COURT SHOULD STAY MR. WOOD'S EXECUTION

35. This Court should issue a stay of execution to preserve its jurisdiction over Mr. Wood and his claim and ensure this petition is not rendered moot by Mr. Wood's execution before *McKinney* is decided. In considering a request for a stay of execution, this Court considers "not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

36. The facts and arguments above demonstrate that Mr. Wood is likely to succeed on the merits of his *Tennard* claim. The Arizona Supreme Court's plain language in *Styers I* shows it applied an unconstitutional causal connection requirement to Mr. Wood's mitigation. This error is either structural or, as explained, Mr. Wood has shown he was harmed by the error. The harm to the State is minimal because the delay in executing Mr. Wood should *McKinney* not be decided in his favor will be only a matter of months and this claim does not require remand to the district court for resource-intensive discovery or evidentiary development through a hearing. But the harm to Mr. Wood is infinite if he is executed and *McKinney* is then decided in a way that would have finally compelled the Arizona Supreme Court to permit his resentencing.

PRAYER FOR RELIEF

37. Therefore, Your Honor should grant a stay of execution to preserve this Court's jurisdiction over Mr. Wood until the decision in *McKinney v. Ryan* is announced.

38. Your Honor should also grant Petitioner habeas corpus relief, declaring his death sentences unconstitutional as violating the Eighth and Fourteenth Amendments to the United States Constitution.

39. Your Honor should also grant any other relief which is appropriate and just under the circumstances.

Respectfully submitted this 18th day of July, 2014.

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BEFORE THE CIRCUIT JUDGE
OF THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph R. Wood, III,	)	
	)	
Petitioner,	)	
	)	No. _____
v.	)	
	)	
Charles Ryan, *et. al.*,	)	
	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

To The Honorable Kim McLane Wardlaw, Circuit Judge Of The United States

Court of Appeals For The Ninth Circuit:

I. Your Honor Has Jurisdiction over the Petition.

The express language of 28 U.S.C. §2241 confers upon a circuit judge the power to issue a writ of habeas corpus: "*Writs of habeas corpus may be granted by* the Supreme Court, any justice thereof, the district courts, and *any circuit judge* within their respective jurisdictions." 28 U.S.C. §2241(a) (emphasis supplied); *see Bowen v. Johnston*, 55 F.Supp. 340, 341 (N.D.Cal. 1944)(circuit judge's jurisdiction to issue writ exists within states of judge's circuit). Thus, as a circuit judge, Your Honor has the authority and power to issue a writ of habeas corpus. *Dragenice v. Ridge*, 389 F.3d 92, 100 (4th Cir. 2004)(language of §2241 which confers habeas jurisdiction on "any circuit judge within their respective jurisdictions" means that "while a single circuit judge may entertain a habeas petition, courts of appeals may not."); *United States ex rel. Leguillou v. Davis*, 212 F.2d 681, 682 (3d Cir. 1954)(circuit judge granted writ of habeas corpus); *Ex Parte Jefferson*, 106 F.2d 471 (9th Cir. 1939)(circuit judge entertained, but denied, application for writ of habeas corpus); *Knooda v. Wallace*, 53 F.Supp. 1 (E.D.Ill. 1944)(circuit judge entertained petition for writ of habeas corpus). *See Chapman v. Teets*, 241 F.2d 186, 187 (9th Cir. 1957)("The Court, as such, is not under §2241 of Title 28 granted the power to entertain such a petition, although individual circuit judges are.").

The existence of a circuit judge's power is evident from other language of the judicial code as well. The remainder of §2241(a) provides that "[t]he order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." Similarly, 28 U.S.C. §2242 states that if an application "if addressed to . . . a circuit judge . . . it shall state the reasons for not making the application to the district court of the district in which the applicant is held." Section 2242 also makes clear that a circuit judge may entertain an application. Where a statute is unambiguous (as it is here) further judicial inquiry concerning the statute ceases. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 846 (1997). *See e.g., Demore v. Kim*, 538 U.S. 510, 534 (2003)(O'Connor J., concurring)(plain language controls)

Fed.R.App. P. 22 states: "An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court." By its terms, however, Rule 22 does not divest a circuit judge of jurisdiction to issue a writ of habeas corpus, as §2241(a) explicitly provides. Rule 22 does not contain any "clear statement" of the repeal of a circuit court's jurisdiction, and therefore, it does not eliminate Your Honor's jurisdiction to issue a writ of habeas corpus. *INS v. St Cyr*, 533 U.S. 289, 308-309 (2004). Repeals by implication are disfavored, and "will not be found unless an

intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Thomas v. Crosby*, 371 F.3d 782, 808 (11th Cir. 2004)(Tjoflat, J., concurring). In *St. Cyr*, the Supreme Court held that there was no "clear statement" of the repeal of existing habeas jurisdiction even when Congress had, in its title to the legislation, included language "Elimination Of Custody Review By Habeas Corpus" and had provided a statement of intent to preclude habeas review. *St. Cyr*, 533 U.S. at 308-309. §2241(a) survives intact. The rule does appear to be at odds with 28 U.S.C. §2241(b), which itself gives your Honor discretion to transfer the petition to a district court.

Your Honor retains the authority to grant the writ of habeas corpus for several reasons. First, Mr. Wood is proceeding under §2241(a) & (b), and he is not proceeding under Rule 22. His invocation of §2241 controls, and the statute trumps the rule. Second, because the provisions of §2241(a) and (b) remain intact and have not been explicitly repealed, Your Honor is required to apply those provisions. Under those provisions, Your Honor has the discretion to transfer the petition to the District Court, but it is not mandatory. Third, because Your Honor has jurisdiction under §2241(a), it cannot be implicitly divested by Rule 22. As noted *supra*, Congress cannot eliminate jurisdiction without an explicit repeal, and it has not engaged in any explicit repeal here. Where §2241(a) and (b) are explicit by their terms, they apply

by their terms and are applicable here. Especially where Congress has not been reluctant to rewrite the habeas statutes, it certainly cannot be said that in 1996 – while it was rewriting many portions of the habeas statutes – it overlooked §2241.

If Congress had wanted to eliminate a circuit judge's jurisdiction over habeas matters, it would have eliminated its dual references to "circuit judges" in §2241(a), it would have eliminated "circuit judge" from the provisions of §2241(b), and it would have eliminated "circuit judge" from the provisions of §2242. Congress did not do so. In no fewer than four statutory provisions, federal law explicitly and implicitly provides a circuit judge jurisdiction to hear a habeas corpus matter. Those explicit provisions simply cannot be ignored.[1] The "grant of habeas corpus jurisdiction under 28 U.S.C. §2241" "has been part of the juridical fabric of this nation since its enactment in the first Judiciary Act." *Goncalves v. Reno*, 144 F.3d 110, 119 (1st Cir. 1998). Joseph Wood invokes that authority here. Your Honor may

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[1] In *Felker v. Turpin*, 518 U.S. 651 (1996), the Supreme Court seemed to assume that a circuit judge lacked jurisdiction to hear a petition for writ of habeas corpus. *See Id*. at 661. That, of course, is *dicta*, as the holding of *Felker* is that the Supreme Court has jurisdiction over an original habeas petition. The issue of Your Honor's jurisdiction simply has not been decided, either by the Ninth Circuit or the Supreme Court. In *Felker*, though, the Supreme Court made clear, as Mr. Wood argues here, that repeals by implication are disfavored. Especially in light of the numerous explicit references to "circuit judge" which remain intact in §2241(a), §2241(b), and §2242(b), it cannot be said that Your Honor's jurisdiction has been eliminated.

properly exercise jurisdiction over Mr. Wood's petition. The Supreme Court affirmed this continuing authority in *Boumediene v. Bush*, 553 U.S. 723, 777 (2006) (citing § 2241 as providing jurisdiction for a circuit judge to issue a writ).

II. Your Honor's Authority to Grant the Writ.

Derived from the Judiciary Act of 1867 (which in turn was derived from the Judiciary Act of 1789), the habeas corpus jurisdiction established by 28 U.S.C. §2241 constitutes the broadest possible grant of habeas power to the federal courts. *Ex Parte McCardle*, 6 Wall. 318, 325-326 (1869); *Fay v. Noia*, 372 U.S. 391, 417 (1963). That grant of power applies by its very terms, and it has never been abrogated by Congress, even by the AEDPA. Rather, habeas jurisdiction under §2241 remains intact because there has never been any explicit repeal of that broad jurisdiction by Congress. Moreover, history and evidence of Congressional intent prove that §2241 remains a viable remedy in this case which presents exceptional circumstances, as explained in the accompanying petition.

Mr. Wood has the right to invoke §2241 when requesting habeas corpus relief. Having done so, the provisions of 28 U.S.C. §2244 are inapplicable, because that provision only applies to successive petitions filed under 28 U.S.C. §2254.

Mr. Wood satisfies the standard for review of his claims and the granting of relief under §2241. Because denial of relief on this claim will unjustly deprive Mr.

Wood of his life and result in a miscarriage of justice, the ends of justice mandate relief here. Anything less would not serve the cause of "justice" (28 U.S.C. §2243), and would instead cost a man his life despite the clear violation of his constitutional rights. Your Honor should exercise jurisdiction under 28 U.S.C. §2241 and should grant habeas relief and/or order further proceedings.

A. History Of The Great Writ

As the Supreme Court explained in *Fay v. Noia*, 372 U.S. 391, 399-400, 83 S.Ct. 822, 827-828 (1963): "We do well to bear in mind the extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence: 'the most celebrated writ in the English law.'" It is:

> [A] writ antecedent to statute, and throwing its root deep into the genius of our common law . . . .It is perhaps the most important writ known to the constitutional law of England, affording as it does *a swift and imperative remedy in* ***all*** *cases* of illegal restraint or confinement. It is of memorial antiquity, an instance of its use occurring in the thirty-third year of Edward I [1305]. Received into our own law in the colonial period, given explicit recognition in the Federal Constitution, Art. I, §9, cl. 2, incorporated in the first grant of federal court jurisdiction, Act of September 24, 1789, c. 20, §14, 1 Stat. 81-82, habeas corpus was early confirmed by Chief Justice John Marshall to be 'a great constitutional privilege.'

Fay, 372 U.S. at 400, 83 S.Ct. at 828 (internal citations omitted)(emphasis supplied). Given the hallowed place of the writ of *habeas corpus* in our jurisprudence: "[T]here is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19,

26 (1939).

The continuity and stability of the writ over the centuries is nothing short of remarkable. "[T]he nature and purpose of habeas corpus have remained remarkably constant." *Fay*, 372 U.S. at 402, 83 S.Ct. at 829. After its first use in 1305, the writ of *habeas corpus* was ultimately codified in England in the Habeas Corpus Act of 1679. After the Founders enshrined the writ in the Constitution, Congress almost immediately established it by statute in 1789, conferring habeas jurisdiction which authorized "*all federal courts* . . . to grant the writ of habeas corpus when prisoners were 'in custody, under or by the colour of the authority of the United States . . . ." Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 82, *quoted in Felker v. Turpin*, 518 U.S. 651, 659, 116 S.Ct. 2333, 2338 (1996).

Again, in 1867, Congress reaffirmed the federal district courts' power to issue writs of habeas corpus to any person held in custody "in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, codified as Rev. Stats. §753.[2] This jurisdictional grant conferred upon "The Supreme Court and the Circuit and District Courts" (Rev. Stats. §751) was "in language as

[2] Rev. Stats. §753 provided, in pertinent part, that "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is . . . in custody in violation of the Constitution, or of a law or treaty of the United States." *Ex Parte Royall*, 117 U.S. 241, 246, 6 S.Ct. 734, 737 (1886)..

broad as could well be employed." *See Ex Parte Royall*, 117 U.S. 241, 245, 248, 6 S.Ct. 734, 737-738 (1886). As the Supreme Court has made manifest, the Act:

> is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.

Ex Parte McCardle, 73 U.S. (6 Wall.) 318, 325-326 (1867). It extended the habeas corpus power "to what was conceived to be its constitutional limit." *Fay v. Noia*, 372 U.S. at 417, 83 S.Ct. at 837.

Providing the broadest possible power to the federal courts to grant habeas relief, the Act of 1867 is "the direct ancestor of [28 U.S.C.] §2241(c)(3)," which was adopted in 1948. Today 28 U.S.C. §2241(c)(3) provides: The writ of habeas corpus shall not extend to a prisoner unless . . . ***he is in custody in violation of the Constitution or the laws or treaties of the United States***. 28 U.S.C. §2241(c)(3)(emphasis supplied). *See Felker*, 518 U.S. at 659 n. 2, 116 S.Ct. at 2338 n. 2.

The historical lesson to be drawn from the 1867 Act and its continuation to this day in 28 U.S.C. §2241 is this: §2241, like the Act of 1867, embodies the habeas corpus power at "its constitutional limit." Further, §2241(c)(3), by its very terms and because it broadly embraces all persons illegally detained, applies to all persons "in

custody in violation of the Constitution or laws or treaties of the United States."

The broad power first conferred by the Act of 1867 is the same broad power that remains in effect today in §2241(a) & §2241(c)(3). Section 2241 thus remains the ultimate repository of all habeas corpus jurisdiction to allow every district and circuit judge to inquire into "*every possible case* of privation of liberty contrary to the National Constitution, treaties, or laws." *Ex Parte McCardle*, 73 U.S. (6 Wall.) at 326. It is that all-encompassing jurisdiction which Mr. Wood invokes here.

B. 28 U.S.C. §2241 & §2241 (c)(3) Are Fully Applicable To Mr. Wood's Habeas Corpus Petition

When a prisoner is in custody pursuant to the judgment of a state court, a federal circuit court judge has jurisdiction to grant relief on a habeas application made pursuant to 28 U.S.C. §2241(a) & (c)(3). *Thomas v. Crosby*, 371 F.3d 782, 788-812 (11th Cir. 2004)(Tjoflat, J., specially concurring).

Indeed, 28 U.S.C. §2241 fully applies here for numerous reasons, including:

(1) §2241 applies by its very terms;

(2) §2241 has never been explicitly repealed as a basis for jurisdiction in state cases;

(3) Comparing §2254 & §2255, Congress has expressed a limitation on the use of §2241 only in federal cases, not state cases;

(4) Congress has otherwise distinguished between "§2254" habeas cases and non-§2254 habeas cases involving state prisoners.

Under these circumstances, Mr. Wood may proceed under the habeas corpus statute from which all habeas power ultimately derives, and which contains the broadest possible scope of habeas jurisdiction – 28 U.S.C. §2241.

1. 28 U.S.C. §2241(c)(3) Applies By Its Very Terms

As Judge Tjoflat has explained, when assessing the applicability of §2241 to cases involving state prisoners, "We begin with the statutory text," of §2241(a) & (b)(3), which provides that:

> (a) Writs of habeas corpus may be granted by . . . any circuit judge. . . within their respective jurisdictions . . . .(c) The writ of habeas corpus shall not extend to a prisoner unless . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

See Thomas, 371 F.3d at 803 (Tjoflat, J., concurring). By its very terms, therefore, §2241(c)(3) makes "the writ available to any federal and state prisoners who have federal constitutional claims." *Id*. A reviewing court is constrained to give to §2241 its "plain and natural meaning," which means that it provides a basis for relief to state prisoners – even though §2254 may provide a separate remedy. *Id*. There is no reasonable argument that the language of §2241(c)(3) does not embrace Mr. Wood's case. As Judge Tjoflat makes clear, it does. Thus, "a convicted state prisoner . . .

may challenge any aspect of his conviction or sentencing . . . under either §2241 or §2254. *Id.*

2. Congress Has Never Explicitly Repealed §2241

Further, to say that §2241 jurisdiction does not exist in this Court, one would have to conclude that – notwithstanding the plain language of §2241 – Congress repealed §2241 and all of §2241's precursors as a basis for jurisdiction in this case. But as the Supreme Court has stated when addressing whether Congress repealed §2241 as it applies to certain immigration matters: "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." *Immigration And Naturalization Service v. St. Cyr*, 533 U.S. 289, 360-361, 121 S.Ct. 2271, 2278-2279 (2001), *citing Ex Parte Yerger*, 75 U.S. 85, 105 (1869)("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.").

Here, there is nothing in the text of the habeas statutes which repeals Your Honor's jurisdiction to consider habeas claims of state prisoners under §2241(a) & (c) – jurisdiction which was first conferred in 1867. That jurisdiction remains fully intact. Even AEDPA's relevant provisions "make[] no mention" that §2241

jurisdiction has been repealed as to cases of state prisoners – or any cases at all. Thus, it is not surprising that the Supreme Court has held that the AEDPA did not repeal §2241 in a case of a state prisoner seeking habeas corpus relief: "[W]e decline to find a . . . repeal of §2241 of Title 28 . . . by implication." *Felker v. Turpin*, 518 U.S. at 661, 116 S.Ct. at 2339. In fact, *Felker*'s holding that the Supreme Court retains habeas jurisdiction under §2241 clearly confirms that §2241 remains intact as a jurisdictional basis before a circuit judge as well.[3]

Congress did not implicitly or explicitly repeal §2241 jurisdiction by passing §2254 or amendments which apply to §2254 cases. As Judge Tjoflat explains:

> The language of both §§2241 and 2254 is broad enough to allow state prisoners to seek writs of habeas corpus. Section 2254, however, does not explicitly purport to amend, repeal, limit, or revise §2241. Consequently, we should not interpret the elaborate restrictions established for §2254 . . . as curtailing a convicted state prisoner's right to seek relief under §2241. If Congress wishes to change the broad

[3] In other words, if §2241 no longer existed as a jurisdictional basis for habeas claims in cases involving state inmates, the Court in *Felker* would have had to conclude that original writs of habeas corpus in the United States Supreme Court were unavailable there as well, because the Supreme Court's jurisdiction over such matters lies under §2241. Similarly, it is not surprising that, as to certain deportation cases, the Supreme Court has also found that §2241 remains a viable remedy in the federal district courts because Congress "has not spoken with sufficient clarity" to repeal §2241 as to this class of cases. *Calcano-Martinez v. I.N.S.*, 533 U.S. 348, 121 S.Ct. 2268 (2001); *I.N.S. v. St Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001); *Pak v. Reno*, 196 F.3d 666, 673 (6th Cir. 1999)("[A]bsent a clear statement from Congress, we decline to interpret [106(a)(10) of the immigration and Naturalization Act] as also repealing general habeas jurisdiction under §2241.")

> language of §2241, it is free to do so, but neither the original enactment or, nor subsequent amendments to, §2254 is enough to accomplish that task.

Thomas, 371 F.3d at 808. Thus, because there has been no repeal of §2241 jurisdiction, §2241 exists here – just as it has since the 19th Century.

3. Congressional Intent And Historical Evidence Confirm The Availability Of §2241 In This Case

Historical evidence and evidence of Congressional intent confirm the availability of §2241 relief in this case. First, as a historical matter, §2241 and §2254 have been found to provide separate routes for relief. *Thomas*, 371 F.3d at 803-806. This is made manifest by the Supreme Court's decision in *Ex Parte Yerger*, 75 U.S. (Wall.) 85 (1868), which made clear that the Judiciary Acts of 1789 & 1867 were "entirely separate and independent from each other." *Thomas*, 371 F.3d at 805-806.

In addition, Congress' differential treatment of §2241 as a remedy in state and federal cases also shows that §2241 is not limited in state cases. As Judge Tjoflat explains, 28 U.S.C. §2255 – adopted at the same time as §2254 – includes an express limitation on the use of §2241 for federal prisoners, but does not do so for state prisoners. This demonstrates Congressional intent not to limit §2241's application in state cases. *Thomas*, 371 F.3d at 805-807. The simultaneous passage of §2254 & §2255 shows that "Congress knew how to restrict access to §2241 when it wanted to,

and it chose not to do so for state prisoners." *Thomas*, 371 F.3d at 807. "We must," therefore, "respect that choice." *Id. See e.g., Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997)(Congress took different approaches to different habeas remedies).

Finally, 28 U.S.C. §2244 itself distinguishes between "habeas corpus applications under section 2254" and any "habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court," thus demonstrating that there are "habeas corpus proceedings brought" by state prisoners which are not included in §2254. *Thomas*, 371 F.3d at 807-808. Again, Congressional intent – as expressed in differential language used by Congress – confirms the existence of §2241 jurisdiction in this case.

4. 28 U.S.C. §2241 Applies To Mr. Wood's Petition; 28 U.S.C. §2244 Does Not Apply

Because §2241 by its terms applies to Mr. Wood's petition, because this Court's jurisdiction under §2241 has not been repealed, and because §2241 applies to state cases such as this, Mr. Wood may invoke that jurisdiction. He has. While it is improper for a judge or a court to exercise jurisdiction which Congress has not provided, judges and courts cannot avoid the exercise of jurisdiction properly conferred. Because Your Honor has jurisdiction, and because Mr. Wood invokes that jurisdiction, Your Honor must exercise that jurisdiction to decide his claims.

Because §2241 applies by its very terms, 28 U.S.C. §2244 is inapplicable here. In fact, by its terms, §2244 only applies to petitions filed pursuant to §2254. It simply does not apply to habeas corpus petitions filed under 28 U.S.C. §2241. *See e.g., Rosales-Garcia v. Holland*, 322 F.3d 386, 399 (6th Cir. 2003)(en banc)(because §2244 makes no reference to petitions filed under 28 U.S.C. §2241, §2244 does not apply to §2241 petitions); *Zayas v. Immigration & Naturalization Service*, 311 F.3d 247, 255 (3d Cir. 2002)(§2244 does not apply to habeas petitions filed pursuant to §2241 because the "statutory text" of §2244 "does not in terms govern petitions under §2241."); *Okoro v. Hemingway*, 104 Fed.Appx. 558 (6th Cir. 2004)(§2244 does not apply to §2241 habeas petition).

Therefore, because Mr. Wood has invoked §2241, his claims are not governed by §2244(b) – which only applies to "a claim presented in a second or successive habeas corpus application under section 2254 . . . ." *See also In Re Hanserd*, 123 F.3d 922, 930 (6th Cir. 1997)("A §2241 motion would not be barred by the new restrictions on successive motions and petitions."); *Calderon v. Thompson,* 523 U.S. 538 (1998) (AEDPA provisions on second or successive petitions do not by their terms apply to motions to recall mandate, and therefore do not apply).

III. Mr. Wood's Claims Under §2241 Are Governed By "Abuse Of The Writ" Principles

Having filed a petition under §2241 but having previously filed a petition attacking the same judgment under §2241 (and including §2254), Mr. Wood's current §2241 petition, while not governed by 28 U.S.C. §2244 (which only applies to second or successive §2254 petitions), is governed by general "abuse of the writ" principles applicable to a second §2241 petition. *See e.g., Zayas v. Immigration & Naturalization Service*, 311 F.3d 247 (3d Cir. 2002).

Those "abuse of the writ" principles were enunciated by the Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454 (1991), which held that, if a claim has not been presented in an earlier habeas petition, the Court may still review the claim and grant relief if the petitioner can either: (1) show "cause" for failure to raise the claim in the earlier petition and resulting "actual prejudice;" or (2) establish a miscarriage of justice. *See McCleskey*, 499 U.S. at 495-496, 111 S.Ct. at 1471. Here, a grave miscarriage of justice could result if Mr. Wood is executed before the decision in *McKinney* is announced. That decision may well determine that, in a group of cases including Mr. Wood's, the Arizona Supreme Court consistently and regularly violated *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104,110 (1982). Even were this Court to determine it did not have the procedural mechanism to apply that decision to Mr. Wood, the Arizona Supreme Court certainly believes it does. *State v. Styers*, 254 P.3d 1132, 1134 (Ariz.

2011). When the execution of a prisoner is set while a case is pending which may change the outcome of his case, the Great Writ should be pressed into service.

IV. Mr. Wood Is Entitled To Habeas Corpus Relief And/Or Further Proceedings

Having properly invoked this Court's jurisdiction under 28 U.S.C. §2241, Mr. Wood is entitled to the relief he requests and/or additional proceedings on his petition for writ habeas corpus. Because his petition establishes a denial of his Eighth and Fourteenth Amendment rights, he is entitled to habeas corpus relief.

Respectfully submitted this 18th day of July, 2014.

s/Julie S. Hall
Julie S. Hall

Jon M. Sands
Federal Public Defender
District of Arizona
Dale A. Baich
Jennifer Y. Garcia

Attorneys for Petitioner

Copy of the foregoing delivered by
ECF this 18th day of July, 2014, to:

Jeffrey Sparks

Arizona Attorney General's Office

s/ Julie S. Hall

EXHIBIT

A

James Allender, Ph.D.
Certified Psychologist
Clinical Neuropsychology

REPORT OF NEUROPSYCHOLOGICAL EVALUATION

PATIENT: WOOD, Joseph R.

DATES OF EVALUATION: 10/1/90 & 10/2/90

DATE OF BIRTH: 12/6/58

REFERENT: Lamar Couser, Attorney at Law

REFERRAL NOTE: Mr. Wood is a 31 year old male currently in custody awaiting trial. Neuropsychological evaluation was requested due to a history of head injury and his difficulty recalling the alleged offense. Neuropsychological evaluation was requested in order to assess his current level of functioning.

RECORDS REVIEWED: Psychological evaluation by Larry Morris, Ph.D.; psychological evaluation by Catherine Boyer, Ph.D.; psychiatric evaluation by Barry Morenz, M.D.; report #8908071455 from the Tucson Police Department; interviews with several policemen; interview with defendant done by Mark Espinoza; a variety of police reports from Las Vegas; interview of Mr. Woods by Karen Wright.

ASSESSMENT PROCEDURES: Wechsler Adult Intelligence Scale-Revised; Wechsler Memory Scale-Revised; Rorschach Test; Clinical Interview.

RESULTS: Upon examination, Mr. Wood was alert, cooperative and oriented for person, place and time. His fund of personal and general information appeared within normal limits given his age and education (completion of high school). His mood was appropriate to the testing situation. His speech was clear and coherent without evidence of loose association or tangential thinking.

Upon interview, Mr. Wood reported that he had no recall of the day of the alleged incident. He stated that he recalled the evening before until the time he went to sleep and that his recall began at the time he was laying on the ground after being shot. He reported that the prior evening he had been anxious and nervous because he had not been able to contact Debra Dietz. He stated that when he had last seen Ms. Dietz they had parted on

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good terms with the expectation that he would talk with her the following day. After not having contact with her, for approximately a day and a half, he began to feel anxious. He was unable to contact her which left him with a feeling of no control and frustration. He discussed visiting a friend that evening, and being too emotionally upset to have dinner. He recalled having developed a headache and taking a couple of pills for it and then gone home.

When asked about previous head injuries, Mr. Wood reported that he had suffered three motorcycle accidents in which he might have sustained a head injury. He stated that when he was 15 or 16 years old, he flipped a motorcycle at 60 miles an hour and described himself as landing on his head. At the time he was wearing a helmet. He stated that he was knocked out for a short while but stated that he was not kept in the hospital overnight. He reported this next accident as occurring in 1978 or 1979 when he was riding a motorcycle and flipped over the hood of a car. Again he was wearing a helmet. In this accident he described himself as having gone home first, but having developed such a headache that he went to the hospital. A third accident occurred in 1981 prior to his going overseas in the military. He stated that a tire blew out on his motorcycle and he lost control. Again he was wearing a helmet. He stated after each of these accidents he noticed no change in his thinking or personality. He did state that others noticed that he tended to get in more trouble and be moodier after his last accident, but he attributed this to increased drinking.

When asked about his drug and alcohol abuse, Mr. Wood described himself as an alcoholic who had been in treatment in 1984. He stated that he had abstained from alcohol for some time after his treatment at the VA Hospital but that he had once again started drinking and using drugs. He stated that when he got drunk he frequently got into fights. He stated that his drug of choice was Methamphetamine which he usually got from Ms. Dietz.

Mr. Wood reported that he is currently on Sinequan and that he has been taking this medication for a year for depression. He stated that when he first came to jail, he was depressed and had trouble sleeping. He stated that currently he feels better and that he is less tearful. He denied any suicidal ideation currently. He did describe himself as anxious currently due to the guards being a set of "rookies" who have recently started at the jail and who had been going by the book. He denied any hallucinations or derealization experiences. He also denied any flagrant paranoid ideation but admitted that prior to the alleged

incident he did feel that the world was against him and he could not get ahead.

Formal evaluation of intellectual functioning indicated abilities generally in the average to low average range with a Full Scale I.Q. of 92. He demonstrated a near significant difference between his verbal and visuo-spatial abilities with his Verbal I.Q. falling at 88 while his Performance I.Q. fell at 101. Within verbal subtests he did show some intertest scatter with his performance being in the average range on abstract verbal reasoning and social knowledge and in the low average range on information learned in school, attention and concentration, vocabulary and arithmetic ability. He also demonstrated significant intertest scatter within the visuo-spatial subtests with his attention to visual detail, ability to sequence pictured situations and ability to construct designs with blocks falling within the average range while his psychomotor speed was in the low average range.

Formal evaluation of memory functioning indicated overall memory abilities in the average range with a general memory index of 102 (100=average). He did demonstrate a significant difference between his verbal and visual memory abilities with his verbal memory index being 94 while his visuo-spatial memory index was 122. On tasks of attention and concentration Mr. Wood's abilities fell within the average range. His performance was at the 14th percentile on digit spans forwards and the 61st percentile on digit spans backwards. His performance on visual memory span forward and backwards fell at the 81st and 88th percentile. His performance on immediate recall of a story was at the 47th percentile and after a half hour delay he maintained approximately 90 percent of this information which gave him a percentile score of 54. He did demonstrate the ability to learn pairs of words across repeated trials. Visuo-spatial abilities as assessed by his ability to recall simple line drawings was in the above average range with an immediate recall of drawings giving him a score at the 96th percentile. After a half hour delay, he could recall over 95 percent of the same information which gave him a score at the 94th percentile. He also did well on a task of learning visual pairs of information across repeated trials.

Personality evaluation and screening for psychopathology was accomplished through clinical interview and Mr. Wood's completion of the Rorschach test. Results indicated that Mr. Wood can see things along conventional lines and this argues against any active psychotic thought disorder. His reality testing does

deteriorate however in emotionally charged situations. The most prominent emotional theme within his responses was anger. His responses suggested that Mr. Wood sees his world as hostile and threatening and that he experiences a great deal of anger towards the outside world. He appears to cope with his anger and other emotional conflicts through repression and denial. When these coping mechanisms deteriorate, Mr. Wood's intellectual capabilities are overwhelmed and he has difficulty organizing his thinking. In emotional situationsheis likely to act on his feelings without thinking.

The results of his MMPI which was given to him by Dr. Morris indicate a similar style. Individuals with his profile are characterized as distrustful individuals who often are angry and hostile. These individuals are described as unpredictable, changeable, hostile, irritable and resentful. When anxious these individuals may develop a sense of their world crumbling. Dr. Morris's report reads in part, "Impulsivity and poor judgement are cardinal features of this profile type."

In summary, Mr. Wood is a 31 year old male awaiting trial in the Pima County jail. Neuropsychological evaluation was requested given his history of potentially significant head injuries and his reported memory deficit. Neuropsychological evaluation suggests low average verbal skills and average visuo-spatial skills on intellectual and memory testing. This discrepancy seems consistent with his history of poor academic achievement and possibly a verbal learning disability. His report of no significant change in his thinking and the lack of significant findings on neuropsychological assessment suggest little evidence for cognitive impairment due to his motorcycle accidents. Personality evaluation suggests that he does not demonstrate a psychotic thought disorder although his reality testing does deteriorate in emotionally charged situations. He appears to try to cope with his anger through repression and denial but when these mechanisms aren't successful he has few ways to cope with his feelings. It is likely that in emotionally charged situations, Mr. Wood would act in an angry and impulsive way.

If you have any questions concerning this report, please contact me. Thank you for this most interesting referral.

James Allender, Ph.D.
Clinical Neuropsychologist

JA:aib

EXHIBIT

B

Superior Court

(602) 740-3527

Pima County Court Clinic
Superior Court Building
110 West Congress
Ninth Floor
Tucson, Arizona 85701
Carolyn Ford, A.C.S.W.
Director

May 1, 1990

Mr. R. Lamar Couser
Attorney At Law
Transamerica Building
Suite 805
177 North Church
Tucson, Arizona 85701

Re: Joseph Rudolph Wood, III
CR-28449

Dear Mr. Couser:

Pursuant to your request, I conducted a pre-Rule 11 evaluation of Joseph R. Wood on April 18, 1990 at the Pima County Jail. In addition to the clinical interview, Mr. Wood completed a Biographical Data Sheet and a competency screening measure, which were administered by Court Clinic clerical staff on April 13, 1990. Mr. Wood was informed of the nature and purpose of the evaluation, including the limits of confidentiality, and he appeared to understand this.

Collateral material was reviewed, which included the Pre-Rule 11 Referral Form; a letter from R. Lamar Couser to the Pima County Court Clinic dated 4/02/90; police reports regarding the alleged offense dated 8/07/89; supplementary police reports regarding the alleged offense, the defendant's behavior, and statements while in the hospital dated 8/07/89 through 8/22/89; and the Grand Jury transcript dated 8/15/89.

Joseph R. Wood presents as a rather stocky, muscular, thirty-one year old Caucasian male who was neatly groomed and dressed in jail clothing. He has several tattoos on his arms and shoulder. He was alert and well-oriented.

He was cooperative with the evaluation and provided considerable background information. He did not demonstrate any symptoms of a major mental disorder, either of an affective or psychotic nature. He denied any disturbance in appetite, but described some difficulty sleeping, for which Sinequan, an antidepressant, has been prescribed. He stated that his sleep has improved. This is likely due to situational stress. Otherwise, mood and affect appeared normal. Rate and volume of speech were normal. He denied any current suicidal ideation. No peculiarities of posture, gait, or motor behavior were noted. In sum, Mr. Wood does not appear to presently suffer from any serious mental disorder.

Cognitive functioning appeared grossly intact, including attention, concentration, and memory. Mr. Wood was asked to remember three objects after an approximately fifteen minute period and was able to do so. He also was able to recall as many as five digits in a sequence, but his performance was inconsistent, suggesting some attentional difficulties. He had some difficulty with giving specific dates of historical events, but was able to estimate and put things in proper sequence. His ability to relate relevant information, both remote and more recent, suggests that his general memory functioning is intact. Spoken vocabulary, performance on written materials, and academic history are consistent with intellectual functioning in the average range.

Mr. Wood is a high school graduate and also spent six years in the Air Force after graduating from high school. He described some difficulties in school with reading comprehension, for which he got some special assistance. It was noted that he had some difficulty expressing himself verbally, in that he often hesitated, searched for words and did not speak fluidly, but was able to comprehend questions and communicate his thoughts nevertheless. This might be related to a possible learning disability. Mr. Wood has a history of substance abuse, beginning in his teen years. His father also has had an alcohol problem. He has had a severe drinking problem throughout most of his life. Sometime in 1984, he went through an alcohol treatment program. His drinking caused difficulties in his relationships and he recalled going into "violent rages" and destroying things when he was drinking. He indicated that all of the trouble he has gotten into has been alcohol-related. He goes into violent rages when he is not drunk, but can control himself at those times or remove himself from the situation. He reported frequent blackouts when intoxicated, but never any experiences of memory loss when enraged, unless he was also intoxicated. He also has a history of drug use, including cocaine and methamphetamines, particularly during the last two years.

Mr. Wood gives some suicide history, stating that in 1983 he took a large number of pills after he had been drinking. He was feeling depressed at the time and was having problems with his wife. He was hospitalized subsequent to this attempt, but did not receive any follow-up mental health treatment. He also recalled, again in 1983, threatening to kill himself. He had locked himself in the bathroom with a razor, at his home. His parents called the police, who talked him out of it and then took him to the Veterans Administration Hospital. He stated there was no room, so he was not admitted.

Mr. Wood has had approximately four episodes of unconsciousness subsequent to head injuries, some of them after motorcycle accidents or fights. Most resulted in only a few minutes of unconsciousness, although once he was unconscious for approximately an hour. He was once hospitalized for a week for observation after a head injury. He stated that he did not notice any difficulties in his functioning subsequent to these injuries. He does report daily headaches since a 1981 motorcycle accident, but he stated that they result from a pinched nerve. He also stated that, since this last head injury in 1981, other people told him he had changed and become more moody, "going from calm to upset." He stated that he was never aware of this and had never associated it with the accident.

Competency:

Mr. Wood does not appear to suffer from any current mental condition which would preclude the requisite abilities for competency. In addition, he was able to discuss his case in a rational and coherent manner. He is aware of the charges against him and has a good appreciation for his legal circumstances. He has a "stack" of depositions and has read them, some of which he remembers better than others. He was aware of the consequences if convicted of the alleged offense and he appeared to have an understanding of the different charges which could be filed in the case of a homicide - for example, manslaughter, second degree murder and first degree murder. Thus, he appears to have an understanding of the nature and purpose of the proceedings against him.

Mr. Wood's ability to participate in this evaluation indicates that he should be able to assist counsel and communicate in a rational manner. The only possible issue in competency is his claimed lack of memory for the alleged offense, in that he is not able to relate to defense counsel an account of his mental state and actions during that period.

It is my understanding that this does not necessarily preclude competency if sufficient information is available from other sources to reconstruct the alleged offense. This would be a legal and not a psychological determination.

M'Naghten Sanity:

The defendant claims a lack of memory for the period surrounding the alleged offense and could not provide an account of his thoughts, feelings, and behaviors in the significant period. Collateral material also does not provide much information from which one might infer mental state. Mr. Wood stated that in the month prior to the alleged offense, he was abusing alcohol on a nightly basis, "as much as I could." In the period preceding the alleged offense, he stated that he was "snorting" approximately a gram a day of speed, stating that both he and the victim were doing this on a daily basis. He stated that he used "a little" speed on Saturday morning, which had been left over from the night before. On Saturday, he did not recall being intoxicated. On Sunday, all he could recall was having two drinks and nothing else. From this period on, he stated that he recalls little. He did not recall thoughts about killing his ex-girlfriend. He denied being aware of any suicidal thoughts or feelings in the period or days prior to the alleged offense. In fact, although he acknowledged difficulties in his relationship with the victim, he stated that in the days prior to the alleged offense, things had been going much better. He stated that he last saw her on a Friday afternoon and she had told him she would see him the next day. He also recalled beginning to worry when he did not hear from her, specifically that something had happened to her, such as being put back in jail or getting into a fight with her family. He denied that he was concerned about her leaving him and stated "we'd gotten over that." He stated that he did not sleep much Saturday night, but slept a little on Sunday. He recalled going to talk to his girlfriend, Sherry, and telling her that he was worried. He went back to his apartment, went for a walk around the neighborhood, and then went back to Sherry's house. He recalled that he could not sit still and, again, was quite concerned about Debbie. He also recalled going by the automotive shop and seeing her car parked inside the fence, which increased his alarm that something might have happened to her. He stated that he could not call her family to see if she was alright and he felt "totally helpless." From then on, things are a "blur." He recalls only bits and pieces, which include going to Sherry's house for a third time and having his gun with him, which he always carried.

He did not know how long he stayed there. He recalled being too upset to eat. He denied feeling intoxicated. He remembered leaving Sherry's house when it was dark, but could not recall where he went. He next remembers lying on the ground after being shot.

Collateral material contains some information, but not much. A number of police reports indicate the defendant to be confused about what had happened and unable to remember what he had done. There are other brief reports where the defendant apparently told individuals that he had killed his girlfriend, although it is unclear whether he had already been told what he had done by that time. He also has told individuals that he reached for his gun so that he would be shot by police, suggesting that he wanted to be killed. One police officer reportedly overheard him state to his father, "I knew I shot him, but I didn't know I killed him." Thus, there is some question as to whether the defendant really remembers the alleged incident, or at least more of it than he has indicated to this evaluator.

None of these data clarify his thought processes at the time or his specific intentions or motivations. It is unlikely that he was psychotic, in that he has no history of psychosis and Sherry, who saw him in a distraught state prior to the alleged offense, did not observe psychosis, but rather "sweating and crying." There is evidence to suggest that he may have been suicidal at the time that he was shot, although it is unclear whether he was suicidal at the time he shot the victims. It is possible that suicidal feelings were present at the time of the alleged offense, but they also could have been a reaction to it. He does have a prior suicide attempt, having been intoxicated at that time.

Mr. Wood does not recall being intoxicated immediately prior to the alleged offense, although this would not preclude such a possibility. Any toxicology results are unknown, such as blood alcohol level. Obviously, if his behavior is a direct result of alcohol intoxication, M'Naghten insanity is precluded. He does describe difficulties controlling a violent temper when intoxicated. Defense counsel raises the possibility of a dissociative state. While this was considered, it appears unlikely. Certain personality types are prone to dissociate episodes. Mr. Wood gives no history of difficulties remembering, either during painful events or while angry or distressed. His only history consists of alcoholic blackouts. He does report some difficulty recalling events in his younger days, but these include both good and bad events and do not appear characteristic of dissociation.

It is possible that his memory loss is due to psychological factors rather than an alcoholic blackout, meaning that he has suppressed the painful memory. This would not mean that he was unaware of his actions at the time of them, however. While it is possible that he had a dissociative episode during the period of the alleged offense, there is simply no information available by which one might confirm this.

Regarding concerns about organic impairment, with his head injuries and extensive alcohol and drug abuse, it would not be surprising for Mr. Wood to have some organic impairment. However, he does not appear to have any serious cognitive deficiencies and any impairment is likely to be mild. There is no evidence of cognitive impairment to a degree which would preclude him from being aware of and understanding his own behavior. There is a possibility that his head injury in 1981 affected his emotional functioning - the personality change he referred to. This is not an uncommon phenomenon with head injuries. It is possible that a past head injury may have increased his emotional lability. He has stated that, even though he gets upset, as long as he is not intoxicated, he is able to cope with this emotional arousal. Thus, even if a head injury led to increased lability, it appears likely that the alcohol intoxication is what impairs his self-control, rather than the head injury. The best way to document the possible emotional effects of such a head injury would be to interview those who have known him both prior and subsequent to that injury and to obtain their observations about his behavior. More in-depth neuropsychological and neurological assessment could be conducted, although even if they showed some deficiencies, it is unlikely that they would be sufficient to preclude his being aware of his own behavior. They might provide some information which could be mitigating, however.

Conclusions:

The defendant appears presently competent to stand trial, but issues of his mental state at the time of the alleged offense should be more fully explored via formal Rule 11 evaluation.

If there are any additional questions, please do not hesitate to contact me.

Respectfully submitted,

Catherine L. Boyer, Ph.D.
Clinical Psychologist

CLB/hrm

EXHIBIT

C

CR 28449

LARRY A. MORRIS, PH.D.
Clinical Psychologist

FILED
JAMES N. ROBERTS
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TUCSON MEDICAL PARK
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TELEPHONE (602) 323-3156

PSYCHOLOGICAL EVALUATION

NAME: Joseph R. Wood, III

DATE OF BIRTH AND AGE: December 6, 1958; 31 years

SEX: Male

EDUCATION: High School Graduate

MARITAL STATUS: Divorced

OCCUPATIONAL LEVEL: Auto Mechanic

DATE OF EVALUATION: August 7, 1990

EVALUATED BY: Larry A. Morris, Ph.D.

REASON FOR REFERRAL

Mr. Wood has been charged with First Degree Murder and Aggravated Assault associated with the shooting deaths of Eugene F. Dietz and Debra Ann Dietz.

A Rule 11 Order for Mental Examination was requested in order to assist in determining if Mr. Wood was knowledgeable of the consequences of his actions at the time of the alleged offense, and whether he is competent to stand trial.

EVALUATION PROCEDURES

Clinical Diagnostic Interview
Minnesota Multiphasic Personality Inventory-2 (MMPI-2)
Review of the following collateral documents:

- Tucson Police Department Reports prepared by Officer A. Sueme (8-7-89, 8-13-89); Sergeant Davis (8-7-89); Detective M. Millstone (8-10-89); Officer Dayhoff (8-10-89); Officer Mo. Perez (8-11-82); Officer Kircher (8-11-89); Officer G. Perrin (8-13-89); Officer K. Wright (8-14-89); Officer E. Murch (8-17-89); Officer Ramsey (8-22-89); Sergeant T. Vogel (no date).

Typed transcript of a conversation between Joseph Wood, III and Officer M. Napier on 8-12-89.

Typed transcripts of statements given on 8-7-89 by Richard E. Brown, Margaret Dietz, George Granillo, and Gerald Tibbetts to Detective S. Skuta; by Debbie Kaback to Sergeant R. Torres; by Donald Dietz to Detective Millstone; by Jose A. Guzman and Martin Espinoza to Detective T. Miller; by Paul Hawks and Anita M. Sueme to Detective K. Wright.

Official Court Reporter's Excerpt of Grand Jury Proceedings held before the Pima County Grand Jury on 8-15-89 (92-GJ-181, CR-28449).

Autopsy Reports on Eugene F. Dietz (ML 89-0833) and Debra Ann Dietz (ML 89-0832) prepared by Thomas E. Henry, M.D., Forensic Pathologist, Pima County, Arizona.

BEHAVIORAL OBSERVATIONS AND MENTAL STATUS

Mr. Wood was escorted to my office by two uniformed Pima County Sheriff's Officers. He was secured by handcuffs and leg-irons but the handcuffs were removed for the examination. The clinical interview was conducted in a private office. The MMPI-2 was administered in a room with observation possible through one way windows. Mr. Wood presented as a stocky, well-groomed 31-year-old wearing jail clothing. He appeared oriented as to time, person, place and purpose. Eye contact was adequate. Thoughts were expressed in a logical and coherent manner. Affect appeared appropriate. Strong indices of a major mood or thought disorder were absent. Mr. Wood remained cooperative throughout the lengthy evaluation process.

BACKGROUND INFORMATION

Mr. Wood was born in Belton, Texas but raised in Tucson since the third grade. He was the middle child of three children (one sister, one brother). His father is a retired Air Force Military Police noncommissioned officer, while his mother is a cashier for a local drug store.

As a child Mr. Wood believed that he had a fairly normal relationship with his father, although his father may have been rather "restrictive." He also described occasional episodes of being "hit with a belt" but Mr. Wood did not see this mode of punishment as abusive. In high school Mr. Wood began to recognize that his father was alcoholic and while drinking his father would become more verbally abusive to all family members.

Mr. Wood reported that he "always got along" with his mother. She would usually turn the discipline over to his father by saying something like, "Wait until your father gets home." While Mr. Wood's mother was also a "drinker," she apparently drank less than his father and was not abusive.

As a child Mr. Wood had a strained relationship with his sister. She was four years older than Mr. Wood and "she always got everything. She was dad's favorite." He developed resentment for his sister, "We never got along. I always argued with her." He reported a "normal" relationship with his brother.

Mr. Wood reported establishing friends as a child and teenager, although he did not describe them as "close friends." He explained, "I was always competing with them. I had to do it better." In high school he and his friends had the reputation of "nobody bothered us." However, he reported few fights as a teenager, at least "nothing drastic, nobody got really hurt."

As a student Mr. Wood preferred vocational rather than academic subjects. He stated that he was "better with my hands" and he did not have the "patience" to work at a desk. He was "about average" as a student and graduated high school in 1977.

Upon graduation from high school, Mr. Wood enlisted in the U.S. Air Force. During the first four to five years Mr. Wood did "OK" and was promoted to E-4. When he was shipped to a remote assignment in Korea without his family in 1982 he began to "drink heavily." He was also divorced from his first wife. In Korea he developed a "bad attitude" and was "busted" to E-1 for "fighting and drinking." He received an Honorable Discharge after a total of six years in the service.

Mr. Wood's work history since his discharge includes employment as an auto mechanic or construction worker. He stated he has worked for less than ten employers since the service. He admitted to quitting some jobs because of an "argument with someone about something."

While Mr. Wood reported drinking alcohol while in high school, he points to the period of military service as the time he began to abuse alcohol. During that time, however, he "never saw it as a problem." In 1982 or 1983 he "realized" he had a problem and eventually participated in a treatment program offered by the VA Hospital in Tucson. He reported that the program was the same one his father had completed earlier.

Mr. Wood managed to quit abusing alcohol for over two years. During that time he was pleased that "nobody was drinking" and

his immediate family was "working back together." Unfortunately a series of events then happened, including being unemployed, having a motorcycle accident and seeing his father going back to drinking which seemed to propel Mr. Wood back to abusing alcohol. He explained, "If dad didn't give a damn, I didn't give a damn." He described a pattern of episodic drinking until he would "fall down" or not remember when he stopped. While Mr. Wood was able to recall most of his activities while drinking, he reported a few blackouts.

He reported that alcohol changes him, "I've been told I become an asshole. Everything bothers me. I would fight at the drop of a hat." He admitted, "I have always been mad about something, but I was able to control it when I wasn't drinking." He also indicated that the counselors in the alcohol program were unable to identify the source of the anger.

Mr. Wood experimented with marijuana in high school but found it unpleasant. About six months prior to Mr. Wood's recent alcohol abuse period, he began to experiment with cocaine. He reported that he and Ms. Dietz "could always afford it" and for a period of about one year, they were using cocaine on a daily basis. He stopped for a couple of months, "then I began to use crank/speed." He explained that crank was "cheaper and lasted longer." A pattern of polysubstance abuse continued for the next year or so.

Childhood sexual history appeared unremarkable. First sexual intercourse occurred while a senior in high school. His partner was an age appropriate female who initiated the activity while the two were drinking at a party. He described the experience as pleasant and without any form of sexual dysfunction.

His next sexual experience was when he married in 1978. He described the sexual relationship as "routine, normal sex" and stated, "sex was never a priority with me." This union produced one son who is now nine years old. According to Mr. Wood, the marriage ended in divorce after about four years "because of my drinking."

In 1982, Mr. Wood married for the second time. He reported that he was preparing to leave for Korea and he married his ex-wife's friend because "it seemed like the thing to do." While in Korea, his second wife's 13-year-old "got into trouble and my wife was having a nervous breakdown. I got an emergency leave and came home." This marriage terminated in a divorce after about three months. One episode of domestic violence in this marriage was reported by Mr. Wood. He explained, "one night we were both drinking and we got into an argument about my having to go to

Korea. She went off on me and I nailed her once and knocked her out. I was arrested for domestic violence but my first ex-wife bailed me out."

Mr. Wood met Debra Dietz in 1984 after he completed the VA alcohol rehabilitation program. He described a relaxed and comfortable relationship for over two years then "we both began to abuse alcohol and drugs." The relationship deteriorated as the couple would often argue.. The topic of disagreement would often be related to stress created by Ms. Dietz's immediate family. He explained, "I was never accepted by the family and they would make Debbie choose between the family and me." Mr. Wood describes violent outbursts during arguments which resulted in him destroying "something." He admitted to hitting Ms. Dietz once and "it scared hell out of me."

When asked to describe the events associated with the instant offense, Mr. Wood stated that he and Ms. Dietz had made daily contact since July 1990, in spite of a restraining order. The couple planned to meet on the Saturday prior to the instant offense but Ms. Dietz did not adhere to the arrangements. On Sunday Mr. Wood still had not made contact with Ms. Dietz and he was "getting worried about her." While at a business establishment during early evening, Mr. Wood discovered Ms. Dietz's automobile parked at her family's nearby business. Mr. Wood found this unusual. He reported feeling "worried but lost." Throughout the evening he became agitated and made several trips to and from his apartment and his ex-girlfriend's home. He stated, "She wasn't much help, I don't know why I was going over there." However, she did provide two tablets of an unknown substance for Mr. Wood's "splitting headache." Mr. Wood returned home between 10:00 and 11:00 P.M., watched television then went to bed.

Mr. Wood stated that he does not recall anything from the time he went to sleep on Sunday night until he was "lying on the ground, being in a lot of pain and not knowing why." His next reported memory is "being in the hospital on Wednesday." Even after reading the police reports, Mr. Wood reports being unable to remember "shooting anybody at any time." He acknowledges that the shootings "must have happened, but it doesn't seem real."

Mr. Wood also denies abusing alcohol or drugs during the hours prior to the instant offense. He stated, "I hadn't done any speed since Friday and I only had two drinks on Sunday at Troy's."

While Mr. Wood admitted that he disliked Ms. Dietz's father, he also stated, "I never hated anybody enough to want to kill them."

He also reported that he and Ms. Dietz had made plans to reunite after the situation with the family "calmed down."

TESTING RESULTS

For the purposes of this evaluation, the MMPI-2 has been interpreted using validated clinical research and procedures. On the MMPI-2 Mr. Wood produced a validity scale configuration typical of individuals who respond to the instrument in an open and honest manner. This suggests that the clinical profile is valid and interpretable.

Mr. Wood's clinical profile reveals severe psychopathology characterized by both cognitive and emotional disturbances. Individuals of this profile type often have long-standing problems of unconventional, unusual, or antisocial behavior. Expect substantial environmental and relationship problems as these individuals experience problems of mistrust and are usually unskilled socially. They seldom establish a satisfactory interpersonal relationship. Relationships are likely to be stormy and difficult.

These individuals tend to be argumentative, hostile and aggressive. Angry acting-out is a strong possibility. They also tend to defend and justify their actions as well as projecting blame onto others. Impulsivity and poor judgment are cardinal features of this profile type. These individuals may act impulsively and their behavior may appear bizarre at times. Also expect some form of substance abuse.

SUMMARY AND CONCLUSIONS

Mr. Wood is a 31 year old male charged with the shooting deaths of Ms. Debra Ann Dietz and her father, Mr. Eugene F. Dietz. A Rule 11 examination was requested in order to address issues related to Mr. Wood's competency to stand trial and his state of mind at the time of the offense.

While Mr. Wood is clearly a dysfunctional individual, this evaluation revealed no strong indices that this dysfunction interfered with Mr. Wood's understanding of legal proceedings, the charges against him, and possible penalties, if he should be found guilty. He may experience some difficulty in assisting counsel in planning his defense since he purports not to have any memory of the instant offense. Overall, however, it is my opinion that Mr. Wood is competent to stand trial.

It is difficult to determine whether Mr. Wood was knowledgeable of the consequences of his actions at the time of the instant

Case: 08-99003 07/18/2014 ID: 9174347 DktEntry: 105-3 Page: 21 of 21 (73 of 102)

offense. He is unable to describe his state of mind during the instant offense because he reports no memory of the shootings. The memory loss could be associated with at least three possibilities: A dissociative state during the shootings, post-event memory loss induced by the trauma of the shootings, and malingering. The present evaluation was unable to differentiate among these possibilities. Perhaps an additional examination using hypnosis or an amobarbital interview may assist in this regard.

Respectfully submitted,

Larry A. Morris

Larry A. Morris, Ph.D.
Clinical Psychologist, Certified

EXHIBIT

D

FILE COPY

Barry J. Baker Sipe
Lawyer
216 North Main Avenue
Tucson, Arizona 85701-8220
(602) 622-0722

Pima County Bar No. 2400
Arizona State Bar No. 005090
Lawyer for Appellant

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, Appellee, -vs- JOSEPH RUDOLPH WOOD, III, Appellant.	NO. CR-91-0233-AP (Pima County Superior Court No. CR-28449) MOTION TO WITHDRAW AND REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL ON APPEAL (No hearing requested)

Barry J. Baker Sipe, Esq., counsel for Appellant/Cross-Appellee, moves the Court to enter an appropriate order permitting him to withdraw and appointing substitute counsel for Appellant on appeal, based upon the following reasons:

1. Barry J. Baker Sipe, Esq., has a conflict of interest which prevents him from representing Mr. Wood;

2. Beginning April 6, 1992, Barry J. Baker Sipe will be employed with the Pima County Legal Defender's Office; and

3. The Record on Appeal shows that on September 1, 1989, the trial court ordered the Pima County Legal Defender's Office to withdraw from representation of Mr. Wood because of a conflict of interest due to its prior representation of Debra A. Dietz, the

named victim in Count One of the Indictment, (see, R.O.A., items 1, 9-12).

RESPECTFULLY SUBMITTED this 19th day of March, 1992.

BARRY J. BAKER SIPE, LAWYER

By: Barry J. Baker Sipe
Barry J. Baker Sipe
Counsel for Appellant

Copy of the foregoing
mailed/delivered this date, to:

Paul J. McMurdie, Esq.
Crane McClennen, Esq.
Arizona Attorney General's Office
1275 West Washington
Phoenix, AZ 85007

Pima County Attorney's Office
32 North Stone, #1400
Tucson, AZ 85701

Joseph Rudolph Wood, III
DOC No. 86279
ASPC - Florence
P.O. Box B-86279
Florence, AZ 85232

BARRY J. BAKER SIPE
LAWYER
216 NORTH MAIN
TUCSON, ARIZONA 85701-8220
(602) 622-0722

5

EXHIBIT

E

Joseph R. Wood, III
P. O. Box B-86279
Florence, Arizona 85232

March 25, 1992

Mr. Barry J. Baker Sipe
Attorney at Law
216 North Main
Tucson, Arizona 85701-8220

Re: Arizona Supreme Court No. CR-91-0233-AP
Pima County Superior Court No. CR-28449

Dear Mr. Sipe:

In regards to your letter of March 23rd, regarding the above titled action, please be advised that I do not object to your withdrawal as my counsel of record. Please 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.

Thank you for the effort you've put in on my case. I wish you the best of luck in your new position.

Sincerely,

Joseph R. Wood, III

Joseph R. Wood, III

EXHIBIT

F

26

SUPREME COURT OF ARIZONA

FILED
MAR 25 1992
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

STATE OF ARIZONA, Appellee/Cross-Appellant, vs. JOSEPH RUDOLPH WOOD, III. Appellant/Cross-Appellee.	Supreme Court No. CR-91-0233-AP Pima County No. CR-28449 O R D E R

Appellant/Cross-Appellee having filed a Motion To Withdraw and Request For Appointment Of Substitute Counsel On Appeal, the Court having been advised that Appellee/Cross-Appellant takes no position on this motion, 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.

IT IS FURTHER ORDERED assigning this matter for telephonic conference between Staff Attorney Lloyd Anderson and appellate counsel on Friday, April 17, 1992, beginning at 10:00 a.m. Newly-appointed counsel for Appellant/Cross-Appellee shall make all arrangements for the conference call and shall be sufficiently familiar with the appeal to discuss timetables for filing briefs.

IT IS FURTHER ORDERED that a copy of this order be given to new counsel at the time of appointment.

DATED this 25 day of March, 1992.

THOMAS A. ZLAKET
Justice

TO:

Hon. Grant Woods, Attorney General
Attn: Paul J. McMurdie, Esq.
Bruce M. Ferg, Esq.
Stephen D. Neely, Pima County Attorney
Attn: Thomas J. Zawada, Esq.
Barry J. Baker Sipe, Esq.
Hon. G. Thomas Meehan, Pima County Superior Court
James N. Corbett, Clerk, Pima County Superior Court
Joseph Rudolph Wood, III.

Exhibit G

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

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

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

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

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

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

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

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

Signed this 30th day of June, 2014.

(5090)

Barry J. Baker Sipe

Exhibit H

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

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

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

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

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

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

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

Signed this 30th day of June, 2014.

Harriette P. Levitt

Exhibit I

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

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

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

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

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

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

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

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

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

Signed this 15th day of May, 2014.

Peter J. Eckerstrom

Exhibit J

RECEIVED
FEB 27 2002

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

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

DATE: 02/22/2002

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

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

THE STATE OF ARIZONA, Plaintiff, vs. ARYON WILLIAMS, Defendant(s).	CR15716 MINUTE ENTRY ACTION: RULING ON NOTICE OF POST-CONVICTION RELIEF

PRESENT:

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

Dated this _____day of February, 2002.

_____
JUDGE OF THE SUPERIOR COURT

Mailed/distributed copy: 2/25/2002

EXHIBIT K

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. D. DOUGLAS METCALF

CASE NO. CR028449

DATE: July 09, 2014

STATE OF ARIZONA
Plaintiff,

vs.

JOSEPH RUDOLPH WOOD
Defendant.

RULING

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

IT IS ORDERED this ruling supersedes the ruling filed this date at 10:43 a.m., which was inadvertently filed without the Court's signature.

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

The procedural history of this case is as follows.

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

Defendant filed his first Rule 32 petition for post-conviction relief on February 11, 1992. The trial court stayed the petition pending the outcome of the direct appeal to the Arizona Supreme Court. Following its receipt of the mandate, the trial court appointed new counsel to represent Defendant. Defendant filed a new Rule 32 petition for post-conviction relief on March 1, 1996. This petition raised issues concerning both the

Gina Swecker
Judicial Administrative Assistant

trial and the direct appeal. The trial court denied Defendant's Rule 32 petition in a minute entry dated June 6, 1997. The Arizona Supreme Court denied his petition for review on November 14, 1997. *State v. Wood,* CR-97-0377-PC Order (Ariz. Sup. Ct. Nov. 14, 1997).

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

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

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

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

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

Claim 1 (Causal Connection)

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

> We have independently reviewed the facts establishing the aggravating and mitigating circumstances. *State v. Hill,* 174 Ariz. 313, 330, 848 P.2d 1375, 1392 (1993). We have also

> reviewed the record for evidence of additional mitigating evidence and have found none. The state proved the existence of the A.R.S. §§ 13–703(F)(3) and (8) aggravating circumstances beyond a reasonable doubt. After review of the entire record, we conclude there are no statutory and no substantial, nonstatutory mitigating factors. Taken in isolation, Defendant's substance abuse and alleged impulsive personality are not sufficiently substantial to call for leniency. The trial court correctly concluded the aggravating circumstances outweigh the mitigating circumstances. *Cf. Cornell,* 179 Ariz. 314, 878 P.2d 1352. A.R.S. § 13–703(E) requires imposition of the death penalty.

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

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

Rule 32.1(g) allows a defendant to challenge his sentence in a post conviction relief proceeding when "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." A defendant can raise the significant change in the law challenge in a successive Rule 32 petition if the change in the law occurred after the prior Rule 32 petition has been decided. Rule 32.2(b).

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

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

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

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

Gina Swecker
Judicial Administrative Assistant

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

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

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

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

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

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

Thereafter, (that is, after considering the conflict of interest issue) the trial court entered an Order that Mr. Baker Sipe would continue to represent Defendant in both the appeal and Rule 32 proceeding. This Order

occurred after the trial court had received the Arizona Supreme Court's Order allowing Mr. Baker Sipe to withdraw from representing Defendant in his direct appeal.

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

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

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

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

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

personal to the defendant. *Id.* at 449-450. In that instance, the defendant himself must make a knowing, voluntary, and intelligent waiver. *Id.* at 450.

In *Stewart v. Smith*, the Arizona Supreme Court held that a defendant need not make a personal waiver of his ineffective assistance claim in order to be precluded from raising the issue for a second time in a successive Rule 32 petition. *Id.* at 450 ("The ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong policy against piecemeal litigation."). In cases where the defendant has raised ineffective assistance of counsel previously, the Court need not consider it again. *Id.*; *see also State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525 (2002) ("Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.").

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

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

Gina Swecker
Judicial Administrative Assistant

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

Based on the foregoing,

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

/s/
D. DOUGLAS METCALF
(ID: 0962bdd7-4727-4fdc-b540-992e6bb290c9)

cc: Jeffrey A. Zick, Esq.
Julie S. Hall, Esq.
Attorney General - Criminal - Phoenix
Attorney General - Criminal – Phoenix: Jeffrey Sparks, Esq.
Attorney General - Criminal - Tucson
Clerk of Court - Appeals Unit
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

Gina Swecker
Judicial Administrative Assistant

EXHIBIT L

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-14-0223-PC
Respondent/Plaintiff,	)	
	)	Pima County
v.	)	Superior Court
	)	No. CR28449
JOSEPH R. WOOD,	)	
	)	**FILED 7/17/2014**
Petitioner/Defendant.	)	
	)	
_____	)	**O R D E R**

The Court has considered the Petition for Review/Motion to Recall Mandate/Motion for Stay, the State's Opposition, the Reply, and all related exhibits.

IT IS ORDERED that the Petition for Review/Motion to Recall Mandate/Motion for Stay is denied.

DATED this _____ day of July, 2014.

For the Court:

_____
Scott Bales
Chief Justice

TO:
Jeffrey A Zick
Jeffrey L Sparks
Julie Hall
Joseph Rudolph Wood III, ADOC 86279, Arizona State Prison, Florence - Eyman Complex-Browning Unit (SMU II)
Hon D Douglas Metcalf
Diane Alessi
Amy Armstrong
Dale A Baich