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Attorney for Petitioner

IN THE SUPERIOR COURT OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

State of Arizona,	)	
	)	
Plaintiff,	)	No. CR-28449
	)	
v.	)	
	)	Petition for Postconviction Relief
Joseph R. Wood,	)	
	)	
Defendant.	)	
_____	)	

Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Joseph R. Wood is entitled to relief from his unconstitutional convictions and sentences pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, sections 4, 5, 6, 15, and 24 of the Arizona Constitution. In this petition, Mr. Wood seeks relief from his unconstitutional convictions and capital sentence, caused by trial and sentencing counsel's

ineffective assistance in failing to undertake an adequate social history investigation, mental health testing, and consult, retain and present the proper experts; from his unconstitutional execution, which will subject him to cruel and unusual punishment; and from the State of Arizona's recent denial of his rights to free speech and petition through access to information about his execution and the experimental drugs the State will use to kill him. U.S. Const. Amends. V, VI, VIII, XIV; Ariz. Const. Art. 2, §4, 5, 6, 15, 24.

I. RELEVANT FACTS

Trial counsel conducted almost no mitigation investigation. He ignored the advice of the neuropsychological expert he consulted, Dr. Breslow, who recommended a full neuropsychological battery be conducted. At the sentencing hearing, counsel presented the live testimony of Dr. Breslow, who rendered his conclusions in the absence of a complete social history and recommended testing. Counsel further submitted interview transcripts of Mr. Wood's father, Joseph Wood Jr., and a friend of Mr Wood's. These were the only lay witnesses.

In initial postconviction proceedings, Mr. Wood's counsel requested mental health experts and an evidentiary hearing to allow her to prove the allegations of ineffective assistance of counsel alleged in the petition. In the oral argument on the defendant's motion for evidentiary hearing, Petitioner's postconviction counsel

requested funds to further develop and present the evidence supporting the claims relating to Petitioner's mental health, including the ineffectiveness of Petitioner's counsel at both trial and sentencing. Tr 11/6/1996, at 24, 30, 66. Those resources were denied.

In federal habeas proceedings, Mr. Wood's counsel again requested resources and was again denied. There, Mr. Wood repeatedly requested a full neurological and neuropsychological work-up from the district court. *Wood v. Stewart*, No. cv-98-0053 (Dist. Ct. ECF No. 13 at 2 ("Petitioner seeks funding for a neuro-psychologist to demonstrate that the Petitioner suffers from organic brain damage"); Dist. Ct. ECF No. 24 at 86 n.1 ("Petitioner's request for a complete battery of neurological tests had not yet been granted . . . Petitioner hereby renews his request . . . ."); Dist. Ct. ECF No. 69 at 38-39 ("Petitioner will require the appointment of a mitigation specialist and neuropsychologist, previously requested by Petitioner in these proceedings . . .").) The court denied the requests, and then denied the claim on the basis of the state court record. (Dist. Ct. ECF No. 79 at 71-72 ("The record, which contains, among other items, all of the reports prepared by the mental health experts who had evaluated Petitioner is sufficient to resolve this claim [of trial counsel's ineffectiveness].").)

Mr. Wood, while represented by a CJA panel attorney and still seeking the same resources, filed a remand motion in the Ninth Circuit Court of Appeals, again

requesting resources to develop his claims. (9th Cir. ECF No. 74 at 12-13 ("Mr. Wood now is entitled to discovery and investigation as to the ineffective assistance of trial and sentencing claims . . . .").) Likewise, that motion was denied.

The Federal Public Defender was substituted as co-counsel for Mr. Wood on April 30, 2014. Promptly thereafter, it independently retained experts to, for the first time in the entire twenty-five year history of this case, evaluate Mr. Wood's overall mental health and his neuropsychological functioning.

Neuropsychologist Dr. Kenneth Benedict recently evaluated Mr. Wood and found that he suffers from a number of neurocognitive deficits. Exhibit A, Benedict Report (7/20/14). He states that, at the time of the crime, Mr. Wood suffered from brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions. These were exacerbating influences on Mr. Wood's behavior at the time of the offenses. Exhibit A at 12.

In addition, Mr. Wood has recently been diagnosed with Persistent Depressive Disorder, Early Onset, Severe, Stimulant Use Disorder, Alcohol Use Disorder, and Neurocognitive Impairment by clinical psychologist/certified addiction specialist, Dr. Robert Smith. Exhibit B at 3. Dr. Smith noted that Mr. Wood, like all children of alcoholics, was at severe risk for developing his own

addiction. *Id.* at 8. Dr. Smith concludes that, "[a]s a result of the combined effect of his disorders (i.e., Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the requirements of the law was significantly impaired." *Id.* at 13.

As explained in greater detail below, the evaluations of Dr. Benedict and Dr. Smith constitute newly discovered evidence of Mr. Wood's innocence of premeditated murder and the death penalty.

II. CLAIMS FOR RELIEF

A. TRIAL AND SENTENCING COUNSEL'S PERFORMANCE FELL BELOW THE STANDARD OF CARE AND PREJUDICED MR. WOOD

The Sixth Amendment right to counsel is "a bedrock principle in our justice system…Indeed, the right to counsel is the foundation for our adversary system." *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012). To prevail on a claim of ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), a Petitioner demonstrate that: 1) trial counsel's performance was deficient, and; 2) he was prejudiced by that deficient performance. *Id*. at 691-93. To prove deficiency, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id*. at 690. To prove prejudice, a defendant must show "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The prejudice inquiry weighs the *cumulative* effect of counsel's errors. *See e.g. Harris by and through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). The claim of ineffective assistance of counsel at sentencing is legally substantial. The Supreme Court has found counsel ineffective on numerous occasions in capital cases for failing to adequately investigate and present mitigating evidence. *E.g*., *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Sears v. Upton*, 130 S. Ct. 3259 (2010).

1. Trial and Sentencing Counsel's Deficient Performance

Trial counsel presented only one live witness at the sentencing proceeding, Dr. Michael Breslow, who did not interview Mr. Wood until less than two weeks before the sentencing hearing. Dr. Breslow's testimony in mitigation takes up only 18 transcript pages. RT 7/12/91 at 8-23. In addition to Dr. Breslow's brief testimony, counsel's sentencing presentation included a transcript of an interview with Mr. Wood's father, Joseph Wood Jr., a transcript of an interview with a friend of Mr. Wood's and a stack of Veteran's Administration and Air Force records that counsel neither discussed nor analyzed. RT 7/12/91 at 24-28.

Trial counsel failed to obtain a number of available records or interview important mitigation witnesses. He did not learn about and did not present the vast extent of the addiction and mental health problems on both sides of Mr. Wood's family. Mr. Wood's grandparents were alcoholics. Numerous aunts, uncles and cousins had serious mental health problems and some committed suicide. He did not show that Mr. Wood's father suffered from PTSD upon return from Vietnam, relying instead on a taped interview which only briefly mentioned the father's service in Vietnam.

Similarly, counsel failed to investigate Mr. Wood's social history, failing even to speak to Mr. Wood's siblings, paternal or maternal aunts or uncles. If he had, counsel would have discovered, inter alia, a family history of serious mental illness, including mood disorders. For example, Mr. Wood's paternal aunt, Carolyn, experienced severe postpartum depression after having her first child, and she attempted suicide by overdosing on pills. (6/20/14 Carolyn Wood Interview.) She was referred to a private psychologist for electroshock therapy and participated in inpatient treatment for four to six weeks in Madison, Tennessee. (6/20/14 Carolyn Wood Interview.) Another paternal aunt, Anna Sue, was hospitalized after overdosing on her prescription antidepressants. (Joni Gates Interview.) Her son, Tommy, heavily drank alcohol and had mood

swings—he was described as happy one minute, picking a fight the next minute.[1] (Joni Gates Interview.)

In addition, at least part of the problem was the prevalence of "moonshine" as a part of Joseph Jr.'s family and culture. (6/20/14 Carolyn Interview.) His maternal grandfather had a full water glass of moonshine every morning and his remaining grandparents from both sides heavily drank alcohol. (Aff. of Joseph Wood Jr. pg. 4; Joseph Jr. VA Medical V. CP pg. 351.) Two of his maternal uncles and older half-brother, Billy, also abused alcohol. (Joseph Jr. VA Medical Vs. 6 & 7 pg. 4; Joseph Jr. VA Medical V. 4 pg. 394; Joseph Jr. VA Medical V. CP pg. 254; Interview of Diana Lee Smith pg. 45; 6/20/14 Carolyn Wood Interview; Billy Joe Vaughn Obit; Interview of Mary Wood pg. 26-27.) At age 16, Joseph Jr. quit school after getting mixed up with a bad crowd, and with the consent of his parents, he enlisted in the Air Force on October 27, 1954. Continuing the family cycle of alcoholism, Joseph Jr. persisted in his own abuse of alcohol that began in his early teens, and with time he became a full-blown

[1] On May 22, 2002, Tommy, who had been acting strange all day talking about church and meeting God, shot his wife in the arm and then turned the gun on himself, ending his life. (Maricopa County Sheriff's Office Tommy Hawkins Suicide Report pg. 3, 10; JG Joni Gates Interview.) No alcohol or narcotics, prescribed or illegal, were detected in his system at the time of his death. (Maricopa County Sheriff's Office Tommy Hawkins Suicide Report pg. 10.)

alcoholic diagnosed with liver disease at the young age of forty. (Joseph Jr. VA Medical V. 1 pg. 13.)

Troubled by his parents' chaotic relationship, Wood began to remove himself physically and mentally from the home by hiding in his room or leaving home. Had counsel interviewed his sister, Diana, he would have discovered she also left the home when she saw or heard their parents argue. (Interview of Diana Smith pg. 12-13.) On a few occasions, Wood and his siblings attempted to step in the fights, but most of the time, they got out of the way. (Interview of Diana Smith pg. 14.)

According to Diana, Wood and his siblings were scared to death of their father and afraid to do anything because they would get it from him. (Interview of Diana Smith pg. 25.) While their mother, Mary, was firm and spanked as a form of punishment, Joseph Jr. was the stricter, harsher parent who verbally and physically disciplined his children. (Interview of Diana Smith pg. 25, 27, 33, 36-37.) He was particularly hard on his sons, Joe and Michael. (Interview of Mary Wood pg. 37.) Like Joseph Sr. did to him, Joseph Jr. hit Joe with a belt and once punched him hard enough to knock him unconscious. When Joe regained consciousness, he woke up lying on a picnic bench with Mary wiping blood from his face. Joe felt shame because he believed he caused his father to punch him.

Joseph Jr. also punched Diana in the face once when she was a senior in high school. (Interview of Diana Smith pg. 33.) When asked, Diana said something fell on her and hit her in the eye. (Interview of Diana Smith pg. 33.)

Wood's younger brother, Michael, had an even harder time dealing with the home situation than his siblings. He left home after his high school girlfriend, Debbie, became pregnant and moved in with her and her family. Michael enlisted in the Air Force but did not complete his four year commitment and received a hardship discharged (Joseph Jr. VA Medical V. CP pg. 220; Interview of Diana Smith pg. 57.) After leaving the military, Michael had problems with alcohol abuse and managing his intensely felt anger. (Joseph Jr. VA Medical V. CP pg. 341). Easily angered and upset over the smallest things, he quickly reacted and became confrontational. Often he talked about committing suicide, and on April 24, 1993, Michael died from a self-inflicted gunshot wound to his head following a night of drinking and using "crank." (Michael Wood Death Investigation pg. 2, 7.) He was only 33 years old at the time of his death (Michael Wood Death Investigation pg. 5.)

Incredibly, trial counsel did not refute the statement in the presentence report ordered by the trial judge questioning whether Mr. Wood received an honorable discharge from the Air Force. The discharge was in the very papers,

but hidden in the voluminous number of pages, that counsel submitted to the trial court. Counsel made no mention of it and neither the trial court nor the Arizona Supreme Court found honorable discharge for service to our country as a mitigating factor. *But see Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (service to country in the armed services is mitigating circumstance that Florida Supreme Court should not have discounted).

Here, trial counsel did not seek a thorough neurological exam as recommended by Drs. Breslow and Boyer. PCR ROA 1808. If he had, he could have presented the results Dr. Benedict and, from that, the results Dr. Smith reported that, "[a]s a result of the combined effect of his disorders (i.e., Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the requirements of the law was significantly impaired." Exhibit B at 13. Failure to investigate such rudimentary social history evidence and consult the proper mental health experts fell below the standard of care. *Ainsworth v. Woodford*, 268 F.3d 868, 876 (9th Cir. 2001) (counsel's conduct deficient in part because counsel sought no expert assistance nor any available state funds for experts); *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008)(counsel deficient for failing to investigate defendant's mental health and utilize expert assistance; expert assistance may be "determinative" to

the sentencing outcome); ABA Guidelines (1989), Guideline 11.4.1(C) (penalty-phase investigations “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence”); 11.4.1(D)(3)(B)(counsel should interview witnesses familiar with client’s history); 11.4.1(D)(2)(C)(counsel should collect records regarding client’s medical, educational, military, family, cultural, employment and correctional history); 11.4.1(D)(7)(D)("Counsel should secure the assistance of experts where it is necessary or appropriate for..."), subsection (C)("rebuttal of any portion of the prosecution’s case at the guilt/innocence phase or the sentencing phase of the trial"), subsection (D)("presentation of mitigation"); 11.18.3(F)("In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:"), subsection (1)("Witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;"), subsection (2)("Expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony

presented by the prosecutor."); 11.8.6 (mitigation investigation should encompass client's medical, educational, employment, family, social, correctional, and cultural history); 1 ABA Standards for Criminal Justice 4-4.1, commentary, 4-55 (2d ed.1982)(counsel "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing....Investigation is essential to fulfillment of these functions"). These Guidelines are the roadmap for effectiveness in capital case and trial counsel failed miserably to follow it. *Rompilla v. Beard*, 545 U.S. 374, n. 7 (2005)(relying on 1989 and 2003 ABA guidelines); *Wiggins*, 539 U.S. at 524-25. Counsel's inexecusable delay in preparing his *single* mitigation witness for the sentencing proceeding is further evidence of his deficient performance. *Daniels v. Woodford*, 428 F.3d 1181, 1192 (9th Cir. 2005) (counsel ineffective where, *inter alia*, counsel did not even request funds "for mental health expert testimony until one week before the penalty phase was to begin.")

2. <u>There is a Reasonable Likelihood the Outcome Would Have Been Different</u>

Had this readily available evidence been presented at trial, Mr. Wood could have established two critical challenges to the State's theory of premeditation and its urging that death was the appropriate sentence. First, a

thorough mitigation investigation and neuropsychological exam would have supported a defense that Mr. Wood had a character trait of impulsivity, and the murders were not premeditated. *State v. Christensen*, 129 Ariz. 32 (1981) (In prosecution for first-degree murder, trial court committed error in excluding testimony of psychiatrist that, in his expert opinion, defendant had difficulty dealing with stress and in stressful situations his actions were more reflexive than reflective, in that establishment of character trait of acting without reflection would have tended to establish that defendant acted impulsively, and from such fact jury could have concluded that defendant did not premeditate the homicide); Exhibit A at 12 (Mr. Wood's "brain-based difficulties with sustained attention, speed of processing information, and adaptive problem-solving under stressful and changing conditions served as exacerbating influences at the time of Mr. Wood's offense."); Exhibit B at 13 ("At the time leading up to the instant offense, Mr. Wood was overcome with a sense of failure, despair, and depression. Due to the affects of his depression, addiction and neurocognitive impairments, he was overwhelmed and unable to cope with the changes and stresses in his life at that time."); *id*. at 15-16 (As a result of the combined effect of his disorders (i.e. Persistent Depressive Disorder, neurocognitive impairments, and substance abuse), Mr. Wood's capacity to conform his conduct to the

requirements of the law was significantly impaired. ... He responded to...['stressful and changing conditions] in an impulsive and erratic manner that ended in aggression and violence toward the victims, resulting in their deaths." Second, the same evidence would have supported the Ariz. Rev. Stat. § 13-703(G)(1) statutory mitigating factor. Now that this evidence has been discovered and presented, he is entitled to relief from his death sentence.

For example, counsel failed to obtain Mr. Wood's father, Joseph Jr.'s, military records.[2] If he had, he would not only have corroborated the statements given to him by Joseph Jr., but uncovered a detailed history of honorable military service and trauma exposure that contextualized his compromised mental health and treatment of Mr. Wood. These records show that on March 4, 1969, Mr. Wood's father, Joseph Jr., began a one-year isolated tour of duty at Cam Ranh Bay Airbase in Vietnam. (Joseph Jr. Archived Military Personnel File pg. 29, 120.) He was shot at in the air, and his base had weekly rocket attacks from an opposing enemy force. (Notes from interview of Joe Wood Jr. 7/31/98 pg. 5; Joseph Jr. archived military personnel records pg. 120.) On August 7 and September 6, 1969, the base came under rocket attack, and as the on-duty Flight Commander, Joseph Jr. was instrumental in alerting all off-duty security

[2] Due to the time constraints of the pending litigation, Mr. Wood is unable to provide these records at this time, but will supplement the record promptly.

personnel and forming the reserve security back-up force; this was all accomplished while the base continued to receive incoming rounds. (Joseph Jr. Archived Military Personnel File pg. 120.) Joseph Jr. and his unit also had the difficult and horrifying task of assisting medics in retrieving wounded and dead soldiers. (Joseph Jr.'s VA Medical V. CP pg. 253.)

A highly praised and regarded military leader,[3] Joseph Jr. left Vietnam with pieces of shrapnel in his left arm, a host of debilitating psychological wounds resulting from the carnage he witnessed, and a bigger drinking problem. (Joseph Jr. VA Medical V. 4 pg. 391; notes from Joseph Jr. Interview 7/31/98 pg. 5; Joseph Jr. VA Medical V. CP 341.) "The thoughts of Vietnam are always in my head," he said, explaining the flashbacks and nightmares he experienced. (Joseph Jr.'s VA Medical V. CP pg. 253.) He exhibited symptoms of hyper-arousal related to his war experiences, and for a long time, he could not watch war movies after returning home. (Joe Jr's VA Medical V. CP pg. 253.) Joseph

[3] Joseph Jr. Archived Military Personnel File pg. 107 (Joseph Jr. was considered a natural leader, highly competent and knowledgeable, and in possession of outstanding qualities of supervision management and initiative); Joseph Jr. Archived Military Personnel File pg. 120 (he was commended for his tact and diplomacy when dealing with senior officers and ability to comprehend complex problems and complete mission requirements in minimum time); Joseph Jr. Archived Military File pg. 84 (he received a bronze star medal for his service in Vietnam).

Jr. also experienced difficulty switching from the position of a powerful leader making decision for a group back to a world where he was significantly less important. (Joseph Jr. VA Medical V. 2 pg. 49.)

When defendants have been able to make this causative showing—that they were significantly volitionally impaired—the Arizona Supreme Court has implicitly determined that a defendant's moral culpability and blameworthiness is sufficiently lessened to warrant reductions in capital sentences to life imprisonment. *State v. Jimenez*, 799 P.2d 785, 798, 800 (Ariz. 1990) (death sentence reduced to life imprisonment when statutory mitigating circumstance was found to exist in light of evidence that defendant's mental illness was a major contributing cause of his conduct); *State v. Mauro*, 766 P.2d 59, 81 (Ariz. 1988); *State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979); *State v. Doss*, 568 P.2d 1054, 1061 (Ariz. 1977).

Counsel's failures to conduct the most basic social history investigation and consult with appropriate mental health experts prejudiced Mr. Wood where the forgone evidence supported a challenge to premeditation and supported the (G)(1) statutory mitigator. Had this evidence been before the jury and sentencing judge, there is a reasonable probability that Mr. Wood would not have been convicted of premeditated murder–and not subjected to the death penalty–or that

the (G)(1) statutory mitigator would have been found to be sufficiently substantial to call for a life sentence. *Jimenez, Mauro, Doss, supra*; *Correll v. Ryan*, 539 F.3d 938, 954 (9th Cir. 2008) (finding prejudice where, had evidence of Petitioner's methamphetamine use been "fully presented," including through the testimony of mental health experts, it "could have risen to the level of a statutory mitigator); *Lambright* v. *Schriro*, 490 F.3d 1103, 1123 (9th Cir. 2007) (finding prejudice where sentencing documents provided "some very limited information" about Petitioner's upbringing but information was "inaccurate, undeveloped, and unsubstantiated;" district court was clearly erroneous in holding that no prejudice existed because the facts regarding Petitioner's childhood were largely identified to the sentencing court).

3. This Claim is Not Precluded

Mr. Wood's ineffective assistance of counsel allegations are supported by Rules 32.1(e) and (h), and meet the exception to preclusion set forth in Rule 32.2(b). This claim arises from newly discovered evidence material facts that would have probably changed his conviction or sentence. This same evidence provides clear and convincing evidence of Mr. Wood's innocence of premeditated murder and the death penalty. As explained above, Mr. Wood did and could not discover the evidentiary basis for his allegation that his

trial/sentencing counsel was ineffective on these grounds until he had the resources to conduct the social history investigation described above, conduct the necessary neuropsychological testing, and present the proper mental health experts. As also explained, the state postconviction court and federal habeas court both denied such resources. These denials of resources violated Mr. Wood's due process rights. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process right to expert assistance); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (due process right to present a defense). It was not until the Federal Public Defender, which has an internal budget, was appointed to represent Mr. Wood that he could develop the prejudice to support this claim. As the reports of Dr. Benedict and Dr. Smith demonstrate, mental health evaluations of Mr. Wood by the appropriate experts demonstrate that he is innocent of the premeditation prong of first-degree murder and innocent of the death penalty as his volitional inhibitions support Arizona's most powerful mitigating circumstance, (G)(1).

B. MR. WOOD'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BY THE STATE'S USE OF AN EXPERIMENTAL PROTOCOL TO KILL HIM.

The State of Arizona intends to execute Mr. Wood using a two-drug protocol of midazolam and hydromorphone. Other states have experimented with lethal-injection protocols using midazolam. Each state used a different

experimental protocol, as each had reports of difficulties and abnormalities.[4] Ohio and Oklahoma were the worst.

Ohio is the only state that has carried out an execution using the same combination of drugs that Arizona intends to use. And during Ohio's execution, there were problems. *See* Tom Watkins, *Family, experts: Ohio execution snafu points to flaws in lethal injection*, CNN, Jan. 19, 2014, http://www.cnn.com/2014/01/17/justice/ohio-execution/index.html. In January 2014, Ohio executed Dennis McGuire using midazolam and hydromorphone, and witnesses to the execution reported that after several minutes, McGuire "began gasping for breath, his stomach and chest were compressing deeply, he was making a snorting sound, almost a choking sound at times." *Id.* For about ten minutes, McGuire appeared to struggle in his restraints. *Id.*

On April 29, 2014, Oklahoma attempted to execute prisoner Clayton

[4] *See, e.g.*, National Public Radio, *Lacking Lethal Injection Drugs, States Find Untested Backups*, Oct. 26, 2013, *available at* http://www.npr.org/2013/10/26/241011316/lacking-lethal-injection-drugs-states-find-untested-backups (explaining that Florida was the first state to execute a prisoner using midazolam and noting that the prisoner's eyes remained open longer than usual and after ten minutes, the prisoner's head started moving around); Tom Watkins, *Family, experts: Ohio execution snafu points to flaws in lethal injection*, CNN, Jan. 19, 2014, http://www.cnn.com/2014/01/17/justice/ohio-execution/index.html; Eric Eckholm and John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, New York Times, May 1, 2014, *available at* http://www.nytimes.com/2014/05/02/us/oklahoma-official-calls-for-outside-review-of-botched-execution.html.

Lockett using midazolam as the first drug in a three-drug protocol. Prior to his scheduled execution, Lockett continually attempted to obtain information regarding the drugs that were to be used in the execution by challenging the statutory provisions that allegedly made information regarding the drugs confidential. *See* Andrew Cohen, *Oklahoma's Courts Are at War Over Lethal-Injection Secrecy*, The Atlantic, Apr. 21, 2014, *available at* http://www.theatlantic.com/national/archive/2014/04/Oklahoma/360940/. The Oklahoma Department of Corrections never provided information regarding the drugs, and the Oklahoma Supreme Court did not require the Department to do so. *See Lockett v. Evans* , __ P.3d __, 2014 WL 1584517, at *2 (Okla. Apr. 21, 2014) (reversing the trial court's finding that the state statute's confidentiality provisions were unconstitutional).

For reasons still not known, Lockett's execution went terribly wrong. The execution was halted, the shades to the execution chamber closed, and it was reported that Lockett died of a heart attack. *See* Eric Eckholm and John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, New York Times, May 1, 2014, *available at* http://www.nytimes.com/2014/05/02/us/oklahoma-official-calls-for-outside-review-of-botched-execution.html; Associated Press, *White House: Botched*

Execution in Oklahoma Fell Short of Humane Standards, Huffington Post, Apr. 30, 2014, *available at* http://www.huffingtonpost.com/ 2014/04/30/white-house-oklahoma-execution_n_ 5241314.html. The day after Lockett's death, the Governor of Oklahoma ordered that the Department of Public Safety undertake an investigation into the circumstances surrounding the attempted execution. Press Release, Gov. Fallin Orders Independent Review of Execution Protocols, Apr. 30, 2014, *available at* http://www.ok.gov/triton/modules/ newsroom/newsroom_article.php?id=223&article_id=14134. As a result of the bungled execution, Oklahoma Department of Corrections Director Robert Patton[5] issued a statement that the execution of Charles Warner, who was next in line to be executed, should be stayed indefinitely while an investigation is completed. Then, on May 8, 2014, the Oklahoma Court of Criminal Appeals granted a six-month stay of execution for Warner. *See Warner v. Oklahoma*, No. D-2003-829 (Okla. Crim. App. May 8, 2014). As one appellate court judge

[5]Before taking the position as Director of Oklahoma Department of Corrections in January 2014, Director Patton served as the Division Director for Offender Operations with Arizona Department of Corrections and oversaw executions from 2010 to 2013. *See* Director's Office, Oklahoma Dep't of Corrections, *available at* http://www.ok.gov/doc/About_Us/Director's_Office/; see generally Arizona Dep't of Corrections, Dep't Order 710, *available at* http://www.azcorrections.gov/ Policies/700/0710.pdf (noting the Division Director for Offender Operations shall ensure that "all team members understand and comply with the provisions contained herein").

recognized, "if the State is allowed to enforce the ultimate penalty of death, it is incumbent upon this Court to allow the State the time necessary to ensure that the penalty is carried out in a constitutionally sound manner." *Id.* (Johnson, J., specially concurring).[1]

Mr. Wood alleges that Arizona's unregulated, human experimentation using midazolam and hydromorphone will result in his unnecessary suffering in violation of Article 2, section 15 of the Arizona Constitution. To be sure, unregulated experimentation on humans with drugs is unusual. To prove the cruelty clause of his claim, he requires information which the State, through the Arizona Department of Corrections ("ADC"), has gone to great lengths to conceal. This includes information regarding the provenance of the drugs to be used, the qualifications of the execution team members (who are likely to insert a femoral line such as was used in the Lockett execution and is one of the suspected failures in that horrific event), and the basis upon which the current

[1] Before it was stayed on other grounds, Texas intended to execute Robert Campbell on May 13. Campbell had been attempting to obtain information about the compounding pharmacy that Texas used to obtain the pentobarbital it intended to use in his execution. On Friday, May 9, the U.S. District Court for the Southern District of Texas denied Campbell's motion for a preliminary injunction under "binding precedent" but called for "sober reflection on the manner in which this nation administers the ultimate punishment" in light of "[t]he horrific narrative of Oklahoma's botched execution of Clayton Lockett." *Campbell v. Livingston*, No. 14-cv-01241, Order at 2, ECF No. 11 (S.D. Tex. May 9, 2014).

protocol was developed (which ADC has conceded is based on the same protocol that resulted in the botched Ohio execution).

In litigation in the federal courts, Mr. Wood has attempted to obtain the information related to the lethal injection process in Arizona, which the State intends to use in his execution tomorrow, so that he may provide evidence supporting his claim. On Saturday, a panel of the Ninth Circuit Court of Appeals stayed Mr. Wood's execution conditionally, ruling that Mr. Wood had raised "serious questions as to the merits of his First Amendment claim" and "that the balance of equities tips sharply in his favor; that he will face irreparable harm if the injunction is not granted; and that the injunction is in the public interest. . .." *Wood v. Ryan*, No. 14-16310 Opinion, at 28 (9th Cir. July 19, 2014) (Dkt. 29-1), attached as Ex. C. In reaching its conclusion that Mr. Wood was entitled to "the name and provenance of the drugs to be used in the execution and [ ] the qualifications of the medical personnel" involved in the execution, *id*., the majority considered tactics engaged in by the State in recent executions:

> In the case of Donald Beaty, the State announced eighteen hours before the execution that it intended to switch to the use of a drug that it had never tested and in the use of which if had never trained its executioners. [citation omitted]. In the cases of Robert Towery and Robert Moormann, the state changed its written execution protocol at the last minute, then changed course yet again, informing the court just hours before argument that it was switching

> the method of execution "because it discovered at the last minute that the originally-planned drugs had expired" a month before. [citation omitted]. Here [in Mr. Wood's case], the State has announced that it will use an untested protocol, and that it reserves the right to use Pentobarbital if it becomes available. The recent history in Arizona does not provide a reliable source of data as to its current method of execution, underscoring the need for transparency.

Id., at 26-27. The court explained that it is not only the public that "cannot meaningfully evaluate execution protocol cloaked in secrecy" but courts as well. *Id*., at 27. The court also noted "the ongoing and intensifying debate over lethal injection in this country, and the importance of providing specific and detailed information about how safely and reliably the death penalty is administered." *Id*., at 23. Specifically, the court discussed "several flawed executions this year, including two in Oklahoma, and one in Ohio featuring the same two drugs at issue here" which has "sparked public curiosity and debate over the types–and quality–of drugs that should be used in lethal injections." *Id*., at 21-22 (footnote omitted). The court recognized "[t]here has been a seismic shift in the lethal injection world in the last five years. . .." *Id*., at 20. That shift is the result of the deepening public debate over the process governments use to kill their citizens. Public debate is the fuel that drives the fire of social progress and free speech protections are the spark.

The decision evoked a heated dissent from a lone panel member. *Wood v. Ryan*, *supra* (Dkt. 29-2) (Bybee, J., dissenting). Judge Bybee criticized the opinion as finding a far broader protection in the First Amendment than it contemplates. First, he asserted that the First Amendment does not apply to information about executions because that information is not "a governmental proceeding" or "documents filed therein[.]" *Id*., at 12. Further, the dissent believed that Mr. Wood had not met the federal test for access under the First Amendment. *Id*., at 16 ("(1) 'whether the place and process have historically been open to the press and general public' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'"), *quoting*, *Press-Enter. Co. v Superior Court*, 478 U.S. 1, 8-9 (1984). Nevertheless, even the dissenter was forced to concede that "disclosing the identity of the manufacturer of the drugs. . .enables the public to discuss the manufacturer's decision to supply Arizona with the chemicals used in an execution." Dkt. 29-2, at 22.

Within forty-eight hours of these rulings, the full court voted not to rehear the case *en banc*. *Wood*, *supra*, Dkt. 35-1 (order denying rehearing *en banc*) (attached as Ex. B). Ten judges joined Judge Bybee in dissenting from the full court's vote, with Judge Callahan writing to agree with the points in the Bybee

dissent. *Wood*, *supra*, Dkt. 35-3, at 2. The dissenters complained that the panel had "adopt[ed] an unprecedented view of the First Amendment[.]" *Id*., at 4.

Chief Judge Kosinski also dissented separately. *Wood*, *supra*, Dkt. 35-2. He engaged in the type of public debate that the State is attempting to prevent. He opined that "[s]ubverting medicines meant to heal the human body to the opposite purpose was an enterprise doomed to failure." *Id*., at 2. He explained that

> [u]sing drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments." But executions are, in fact, nothing like that.. . .They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

Id., at 3 (internal citation omitted). The State moved the United States Supreme Court to vacate the conditional stay granted by the Court of Appeals. *Ryan v. Wood*, No. 14A82 (U.S.). That application has been granted and Mr. Wood's execution is scheduled to proceed tomorrow at 10:00 am even though he, like all other members of the public, does not know the provenance of the drugs to be used in his execution, the qualifications of the individuals who will carry out his execution, and how the execution protocol was developed. Clearly, public

debate over lethal injection has become heated in the federal courts as well. Whether the federal courts will ultimately find that the public has a First Amendment right to this information is unclear, but that decision will now come too late for Mr. Wood. Mr. Wood's rights under Art. 2, sections 4 (due process), 6 (free speech), and 15 (to be free from cruel and unusual punishment) entitle him, as a death-sentenced individual and as a member of the public, to this information. This Court's obligation under Article 2, section 6 of the Arizona Constitution is broader than First Amendment protections. That provision guarantees that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz.Const. Art. 2, § 6. The Arizona Constitution is broader in its protection of free speech than the First Amendment. *See State v. Stummer*, 219 Ariz. 137, 142-43, 194 P.3d 1043, 1048-49 (2008) ("The encompassing text of Article 2, Section 6 indicates the Arizona framers' intent to rigorously protect freedom of speech" and has "'greater scope than the first amendment.'" (*quoting Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989). As a result, although the federal courts found themselves without authority under the First Amendment to stay Mr. Wood's execution until the merits of his claim has been addressed, the Arizona Constitution provides far

greater power here.

2. The Disclosure of the Execution Protocol is Likely to Reveal an Article 2, § 15 Violation.

The facts set forth above regarding the use of midazolam in the Ohio and Oklahoma executions, establish a colorable claim that, if proven, will entitle Mr. Wood to relief. Due process demands he be given the opportunity to prove that his execution, using drugs in a never-before tried combination, is likely to result in unnecessary and unconstitutional pain and suffering through discovery supported by his rights to due process and free speech.

3. This Claim is Not Precluded

This claim is viable under Rule 32.1(a), and is not precluded by Rule 32.2 because it only recently became ripe when the Arizona Attorney General publically avowed after being ordered by the Ninth Circuit Court of Appeals to turn over its execution protocol pursuant to the First Amendment, that "turning over the drug protocol is not an option." Maya Srikrishnan, Los Angeles Times, "Federal appeals court grants stay to Arizona death row inmate" (7/19/14)(quoting Stephanie Grisham, spokesperson for the Arizona Attorney General's Office), available at http://www.latimes.com/nation/nationnow/la-na-nn-arizona-execution-stay-grant

ed-20140719-story.html (last visited 7/22/14). Prior to this statement, the Arizona Attorney General had indicated it would provide the drug protocol to Mr. Wood pursuant to the First Amendment if it were ordered to do so. Until the Ninth Circuit's stay was vacated by the United States Supreme Court a few hours ago, Mr. Wood believed his execution would not be carried out unless he received this information.

Mr. Wood's claim regarding the constitutionality of his execution only became available to him a little over one month ago. *Alley v. Little*, 452 F.3d 621, 625 (6th Cir. 2006) (Martin, J., dissenting) ("Had [plaintiff] attempted to challenge his method of execution before the method had been chosen, or before he had even been presented with the choice under the State's procedure, his challenge would clearly have faced issues of ripeness."); *Worthington v. State*, 166 S.W.3d 566, 583 n.3 (Mo. 2005) (finding that, because "it is unknown what method, if any, of lethal injection may be utilized by the State... [when] execution date and method are set, it is premature for this Court to consider whether a particular method of lethal injection violates the Eighth Amendment"); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (holding that a lethal-injection challenge was not "ripe," because there was no execution date and the "method in which lethal injection is currently administered is not

determinative of the way it will be administered at the moment of appellant's execution"). Since that time, he has diligently pursued the information he needs from the State in the federal courts. With that litigation concluded, and still no information forthcoming, he has arrived at this Court.

III. REQUEST FOR EVIDENTIARY HEARING

Ariz.R.Crim.P. 32.8(a) provides that a "defendant shall be entitled to a hearing to determine issues of material fact. . .." Mr. Wood requests an evidentiary hearing on each issue presented in this petition, and any subsequent amendment to this petition, in which there are issues of material fact. These issues will be identified in the reply briefing, following the state's opportunity to identify any factual disputes in its responsive briefing.

IV. CONCLUSION

The facts and claims presented in this petition establish substantial grounds which entitle Petitioner to immediate relief from his unconstitutional and unjust convictions and sentences. To prevent a grave miscarriage of justice, Petitioner requests that this Court grant that relief or, in the alternative, grant Petitioner a hearing at which he may present further evidence in support of his meritorious claims.

Respectfully submitted this 22nd day of July, 2014.

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