No. 07-99005

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD,

Petitioner-Appellant,

–vs–

CHARLES L. RYAN, et al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–97-02577-PHX-ROS

RESPONDENTS-APPELLEES' SUPPLEMENTAL REPLY BRIEF PER ORDER OF FEBRUARY 1, 2013

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the analysis in this Court's withdrawn panel opinion in *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012), *rehearing en Banc ordered by Dickens v. Ryan*, 2013 WL 57802 (9th Cir. 2013), should cause this Court to reconsider its third amended panel opinion, or its denial of Schad's Motion to Vacate Judgment and Remand in light *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)

2. Whether the Arizona Superior Court order of January 18, 2013, has any effect on this Court's review of Schad's claim of ineffective assistance at sentencing, which was rejected in this Court's third amended opinion?

SUMMARY OF ARGUMENT

Even though Schad filed his motion to stay the mandate pending the *en banc* proceedings in *Dickens*, and this Court invited him to argue whether the analysis in the withdrawn *Dickens* opinion should cause it to reconsider its denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Schad's supplemental brief fails to even mention the *Dickens* analysis, much less why it should cause this Court to reconsider its third amended opinion regarding Schad's claim of ineffective assistance of counsel (IAC) at sentencing. Respondents have argued, in their supplemental brief, why the analysis in the withdrawn *Dickens* opinion is flawed, and even if not flawed, does not apply to this case. Accordingly, this Court should not reconsider its third amended opinion or its denial of Schad's *Martinez* motion.

Nor does Schad mention *Cullen v. Pinholster*, 131 S. Ct. 1388 (2010), much less show why this Court erred in denying the IAC claim at issue based on *Pinholster*. *Pinholster* controls this case because the IAC claim was denied on the merits by the state court.

Schad elaborates on his previously-made *Martinez* argument, but *Martinez* does not apply because the district court did not find the claim procedurally defaulted and there is thus no procedural default to excuse.

Schad's attempt to use the affirmative defense of procedural default as a sword to undermine the finality of the state court judgment should not be countenanced by this Court. It would be an abuse of discretion for this Court to independently find a procedural default.

Finally, the Arizona Superior Court's order of January 18, 2013, has no effect on this Court's review of the IAC issue. The order simply says that the claim is precluded in state court because it was raised in the first state post-conviction proceeding. That accords with the district court's finding that the claim was decided on the merits, the district court's rejecting the claim on the merits, and this Court rejecting the claim on the merits. Federal habeas law, including the procedural default doctrine and *Martinez*, is not relevant to the state court's resolution of Schad's successive state post-conviction proceeding.

ARGUMENTS

Schad fails to show that anything has changed since this Court denied his Motion to Vacate Judgment and Remand in light of *Martinez*. Schad fails to discuss the withdrawn *Dickens* panel's analysis, and does not even discuss *Pinholster*, much less why this Court erred by relying on *Pinholster* in its third amended opinion. *Martinez* does not apply because the district court did not find a procedural default that could be excused under *Martinez*. The Arizona Superior Court's denial of Schad's successive state petition for post-conviction relief, because the claim had been presented in a previous petition, does not affect this Court's review of Schad's IAC claim.

I

DICKENS' ANALYSIS

Even though Schad filed a motion to stay the mandate pending the *en banc* proceedings in *Dickens*, and despite this Court's order inviting him to argue whether the analysis in the withdrawn *Dickens* opinion should cause it to reconsider its third amended opinion or denial of Schad's Motion to Vacate Judgment and Remand in light of *Martinez*), Schad's supplemental brief fails to even mention the *Dickens* analysis, much less why it should cause this Court to reconsider its third amended opinion or denial of his *Martinez* motion. Respondents have argued, in their supplemental brief, why the analysis in the withdrawn *Dickens* opinion is flawed, and even if not flawed, does not apply to

this case. This Court should deny oral argument and issue the mandate.

II

PINHOLSTER STILL CONTROLS

Nor does Schad even mention *Pinholster*, much less show why this Court's reliance upon *Pinholster* in its third amended opinion was in error. The applicability of *Pinholster* to this case is made manifest by Chief Judge Kozinski's dissenting opinion in *Pinholster*, where this Court's opinion was overturned by the Supreme Court. Chief Judge Kozinski's dissent asserted that this Court's review should be limited to the record presented in the state habeas petition. *Pinholster v. Ayers*, 590 F.3d 651, 688-690 (9th Cir. 2009) (C.J. Kozinski, dissenting). The dissent warned:

> This is the most dangerous part of the majority opinion as it blots out a key component of AEDPA. *The statute was designed to force habeas petitioners to develop their factual claims in state court.* [citation omitted]. The majority now provides a handy-dandy road map for circumventing this requirement: *A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district judge to consider it in the first instance, free of any adverse findings the state court might have made.* I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure.

590 F.3d at 690 (emphasis added).

When this Court considered the *Pinholster* case, it was in a similar posture to Schad's case. California contended "that some of the evidence

adduced in the federal evidentiary hearing *fundamentally changed* Pinholster's claim so as to render it effectively unadjudicated." 131 S. Ct. at 1402 n.11 (emphasis added). Pinholster argued that the additional evidence that had not been part of the claim in state court "simply support[ed]" his alleged claim. *Id*. The Supreme Court rejected Pinholster's argument:

> We need not resolve this dispute because, even accepting Pinholster's position, he is not entitled to federal habeas relief. Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*"

Id. (emphasis added.)

Here Schad did not support his IAC claim in the first state post-conviction petition with any substantive evidence other than two very general affidavits from a mitigation specialist, Holly Wake. Although Schad has contended that the new evidence he presented in federal court supports his IAC claim, *this Court is precluded from considering it.* This Court's straightforward application of *Pinholster* need not be reconsidered.

III

MARTINEZ DOES NOT APPLY

Schad fails to show that anything has changed since this Court denied his Motion to Vacate Judgment and Remand in light of *Martinez*, and thus there is

no reason for this Court to reconsider its denial of the motion or its third amended opinion. He merely embellishes his previous arguments regarding *Martinez* in support of his Motion to Vacate Judgment and Remand, which was denied by this Court. *Martinez* does not apply here because the district court found no procedural default that could be excused under *Martinez.*

Schad has attached remand orders from three capital habeas cases: *Runningeagle v. Ryan*, No. 07-99026 (9th Cir. Order, July 18, 2012); *Creech v. Hardison*, No. 10-99015 (9th Cir. Order, June 20, 2012); and *George Lopez v. Ryan*, No. 09-99028 (9th Cir Order, April 26, 2012). But in all of those cases, this Court ordered a remand to the district court for *Martinez* analysis of claims that the district court *had previously found were procedurally defaulted.*

Additionally, Schad discusses as some length an unpublished opinion from the Fourth Circuit, *Moses v. Branker*, 2007 WL 3083548 (4th Cir. Oct. 23, 2007). First, as an unpublished decision, the decision is not binding precedent, even in the Fourth Circuit. Second, it is pre-*Pinholster* and pre-*Martinez*, and so does not inform as to how *Pinholster* and *Martinez* apply in this case. Third, to the extent it relies on the holding in *Vasquez v. Hillery*, 474 U.S. 254 (1986), for the proposition that a habeas petitioner who presents facts that "fundamentally alter" a claim has not properly exhausted the altered claim and is subject to procedural default, that reliance is no longer valid for the same reasons it was

not valid in the vacated *Dickens* analysis. Fourth, unlike the present case, the district court in *Moses* found a procedural default, which was upheld by the Fourth Circuit. *Moses*, at **2-3.

Similarly inapplicable are the cases cited by Schad at pages 13-15 for the proposition that the claim is procedurally defaulted because Schad presented new evidence in federal court that made it a new IAC claim. But those cases are based on the same theory as *Hillery*, which does not apply under AEDPA after *Pinholster*.

Schad cites a statement by Respondents, when the case was in district court, arguing that the new evidence placed the claim in a significantly different posture, and thus made it not fairly exhausted and procedurally defaulted. (Supplemental Brief at 15.) But that was made under a *Hillery* theory, and Respondents' argument that the new evidence caused a procedural default was rejected by the federal district court. Moreover, California made a similar argument in *Pinholster*, but the Supreme Court nevertheless held that the IAC claim in federal court had to be decided on the state court record. *See Pinholster,* 131 S. Ct. at 1402 n.11. Even if *Hillery* were still good law, it would not aid Schad because the essence of his federal claim—that counsel provided ineffective assistance at sentencing by failing to adequately investigate and present mitigating evidence—was the same as that presented to the state PCR

court. *See Stokley v. Ryan*, 659 F.3d 802, 809 (9th Cir. 2011).

Despite the issue having been decided on the merits by the state PCR court in the first state PCR proceeding, the district court, and this Court on appeal, Schad attempts to manufacture a procedural default to be used as a sword against Respondents' interest in finality. That is a perverse use of the affirmative defense of procedural default. *See generally Trest v. Cain*, 522 U.S. 87, 89 (1997). It would be an abuse of discretion for this Court, on appeal, to "independently decide" that Schad's claim was procedurally defaulted. *See Wood v. Milyard*, 132 S. Ct. 1826, 1834-35 (2012).

Most of Schad's brief is devoted to arguing why he shows cause and prejudice under *Martinez*. But because *Martinez* does not apply, that analysis is not apt. Furthermore, even under a *Martinez* analysis, Schad's claim fails. *Martinez* requires a prisoner to make a substantial showing on four separate points: (1) trial counsel's performance was constitutionally deficient, (2) trial counsel's deficient performance was prejudicial, (3) PCR counsel's performance was constitutionally deficient, and (4) PCR counsel's deficient performance prejudiced the prisoner's case. *See, e.g., Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012). Schad's IAC claim is not substantial. *See, e.g.,Leavitt v. Arave*, 682 F.3d 1138, 1140-41 (9th Cir. 2012) (*per curiam*). The district court found

that Schad had not "demonstrated that trial counsel's performance at sentencing was either deficient performance or prejudicial." ER at 73.

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]he standard for judging counsel's representation is a most deferential one." *Id*.

As discussed in this Court's third amended panel opinion, sentencing counsel filed a 39-page sentencing memorandum proffering 12 mitigating circumstances and presented testimony at sentencing from 15 witnesses, "including correctional officers, friends, relatives and a psychiatrist." *Schad v. Ryan*, 671 F.3d 708, 718-719 (2010). Furthermore, the pre-sentence report prepared by a probation officer "included discussions of Schad's troubled childhood, favorable character reports from several of Schad's friends and Arizona prison officials, and Schad's good behavior and achievements in prison." *Id.* at 719. Counsel reasonably chose the strategy of showing that Schad was basically a good man, who would benefit from rehabilitation; arguing that he was of "good or stable character." (SER at 1816.) Counsel also proffered as in mitigation expert psychiatric testimony that Schad "now displays no evidence of a potential for violent or dangerous behavior." (SER at 1817.)

The facts of *Strickland*, an opinion issued after Schad's murder, do not support Schad's claim that his counsel was deficient in developing and offering mitigation. The Court stated:

> In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [citation omitted] Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. [citation omitted].

Strickland, 466 U.S. 672-73. The Supreme Court held that, under these circumstances, the attorney's performance was neither deficient under the prevailing norms nor prejudicial: "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure." *Id*. at 700. The Court found no prejudice even though his attorney failed to offer any mitigating evidence, although fourteen friends and relatives of the capital murder defendant were willing to testify that he was "generally a good person," and unoffered medical reports described defendant as "chronically frustrated and depressed because of his economic dilemma." *Id.*

Nor is there a substantial showing of prejudice. *See Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012); *Stokley*, 659 F.3d at 809 ("Even considering the new evidence, we conclude that Stokley has not presented a colorable claim of

ineffective assistance of counsel."); Even if Schad had offered all of the evidence he later submitted in federal court, it would not have mattered because it was cumulative to what was already presented. The district court found: "The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report." (ER 73-74.) The district court noted that Dr. Sanislow's declaration, "when documenting the abuse Petitioner suffered," frequently relied "on the details contained in the presentence report." (ER at 74). The district court found the new material "is either cumulative or, . . . , contradictory to the portrait of Petitioner that trial counsel presented at sentencing." (ER 75.) *See Wong v. Belmontes,* 558 U.S. 15, 130 S. Ct. 383, 386-90 (2009); *Leavitt*, 646 F.3d at 615; *Mickey v. Ayers*, 606 F.3d 1223, 1248 (9th Cir. 2010); *Bible v. Ryan*, 571 F.3d 860, 871-72 (9th Cir. 2009).

Schad argues that Respondents have conceded that PCR counsel was deficient, but that is not true. Rather, Respondents argued that Schad was not diligent in presenting additional facts to the state PCR court, which is a different analysis based on 28 U.S.C. Section 2254(e)(2). Diligence concerns *how* a claim was presented, not whether counsel was deficient under *Martinez* for not raising a claim.

In the vacated second amended opinion, this panel found that "Schad's

legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several obstacles."[1] *Schad v. Ryan*, 606 F.3d 1022, 1043 (9th Cir. 2010). This Court then listed the difficulties. *Id.* It found: "As a result, Schad was unsuccessful in bringing out any significant mitigation evidence during his state habeas proceedings, leading to the denial of his ineffective assistance of counsel claim without an evidentiary hearing in state court." *Id.* Thus, this panel certainly did not find deficient performance by PCR counsel. It simply cannot be said that "Petitioner's postconviction counsel performed his duties so incompetently as to be outside the 'wide range of professionally competent assistance.'" *Miles v. Ryan*, 691 F.3d 1127, 1144 (9th Cir. 2012).

At any rate, *Pinholster* made clear that a diligence analysis is irrelevant

[1] For instance, the first PCR investigator, Sheila Cahill, stated in her supplement of December 3, 1993, that she had found and contacted Schad's mother by telephone, but "that she would not tell me where Mr. Schad's siblings were or how to get in touch with them." (SER at 1834.) Schad's mother said Schad was a good boy when he was growing up, but hung up without saying more. (*Id.* at 1835.) Cahill believed it would be hard to find the rest of the family, and "I don't believe they would cooperate with us." *Id.* The affidavit from Holly Wake similarly noted that: "In previous years, Mr. Schad's family was uncooperative with efforts to obtain information about family history." (ER at 335.) These unsuccessful efforts also show that sentencing counsel was not ineffective for not presenting such information.

when the state court denied the claim on the merits. After remand from the Supreme Court in light of *Pinholster*, this Court held that "[a]lthough Schad sought to present such evidence in the district court, the Supreme Court has now ruled that, when a state court has decided an issue on the merits, the federal courts may not consider additional evidence." *Id*. at 722 (citing *Pinholster*).

Moreover, Schad cannot make a substantial showing of prejudice from any deficiency by PCR counsel, because the district court considered the new evidence (that PCR counsel could theoretically have developed and presented), but found it would not have changed the sentence because it would either have been merely cumulative or it would have been actually contradictory to the primary defense theory at sentencing. ER at 75. *See Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (holding that "the mitigating evidence he [Landrigan] seeks to introduce would not have changed the result.").

IV

THE RECENT ARIZONA SUPERIOR COURT ORDER HAS NO EFFECT ON THIS COURT'S THIRD AMENDED OPINION OR THIS PROCEEDING.

The recent order from the Arizona Superior Court has no effect on this Court's third amended opinion or this proceeding.

Schad misrepresents what the state trial court found in the successive PCR. He incorrectly asserts that the state trial court found the claim barred

under Rule 32.2(a)(3), Arizona Rules of Criminal Procedure, which bars claim that had could have been presented in a prior collateral proceeding, but were not presented. But the state court did not cite Rule 32.2(a)(3), and it did not find the claim precluded for *not* having been presented in the prior PCR proceeding. Rather, it found:

> In his first Rule 32 proceeding, he claimed that his trial counsel provided ineffective assistance at sentencing by failing to investigate and present mitigation evidence. *Thus, because he asserted an IAC claim in his first petition, the defendant is precluded from asserting IAC at sentencing in this successive proceeding.*

(Exhibit A, at page four.) Thus, contrary to what Schad says, the claim was found precluded because it *was* presented in the previous proceeding, rather than because it *was not* presented in the prior proceeding. *See* Rule 32.2(a)(2), Ariz. R. Crim. P. (providing preclusion for claims adjudicated on the merits on appeal or in any previous collateral proceeding).

Accordingly, rather than aiding Schad, the latest state court ruling supports Respondents' position that the same claim was decided and presented to the state court on the merits in the prior PCR proceeding, that the district court decided it on the merits, and that this Court properly rejected the claim on the merits.

Schad laments that the Arizona court did not employ *Martinez* in its rejection of the claim. But *Martinez* and the procedural default doctrine are part

of federal habeas law, and there was no reason for the state court to apply federal habeas law in the state post-conviction context.

Accordingly, the state trial court's ruling in Schad's successive state PCR proceeding presents no reason for this Court to reconsider its prior rulings.

CONCLUSION

For the above reasons, this Court should decline to reconsider its third amended panel opinion, and issue the mandate in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 14, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 15 pages.

s/JON G. ANDERSON
Assistant Attorney General

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, -vs- EDWARD H. SCHAD, Defendant.	**Case No.** P1300CR8752 **RULING**	**FILED** DATE: JAN 18 2013 4:19 O'Clock P .M. SANDRA K. MARKHAM, CLERK BY: B. Chamberlain Deputy

HONORABLE DAVID L. MACKEY	**BY:** Cheryl Wagster Judicial Assistant
DIVISION 1	**DATE:** January 18, 2013

The Court has considered the defendant's Motion To Waive Informa Pauperis Declaration, Notice of Filing Declaration of Indigency and Notice of Filing Client Certification. The Court also has considered the Supreme Court's January 9, 2013 Order appointing Denise Young as counsel for defendant effective November 8, 2012.

This Court acknowledges the Supreme Court's January 9, 2013 Order appointing Denise Young as counsel for defendant effective November 8, 2012. This Court will pay counsel Denise Young at the rate of $100.00 per hour for services performed on and after November 8, 2012.

The defendant's Motion To Waive Informa Pauperis Declaration is **MOOT** in that the defendant's Petition for Post-Conviction Relief was permitted to be filed prior to receipt of the filing of the Declaration of Indigency.

The Court has reviewed the defendant's Petition for Post-Conviction Relief ("Successive Petition"), as well as the court's extensive file. The Court has also reviewed the State's Reply to Response and Supplemental Response to Motion for Warrant of Execution filed in the Arizona Supreme Court on January 2, 2013.

The Court may summarily deny a Petition for Post-Conviction Relief on preclusion grounds before the State files a response. *State v. Curtis*, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 (App. 1995), *disapproved on other grounds* by *Stewart v. Smith*, 202 Ariz. 446, 46 P. 3d 1067 (2002). For the reasons enumerated below, the Court finds that the claims set forth by defendant are precluded as a matter of law.

Defendant has filed this successive Rule 32 proceeding, simultaneously with his Opposition to the Motion for Warrant of Execution following the State's Motion for Warrant of Execution filed in the Arizona Supreme Court.[1]

[1] The Court notes that the Arizona Supreme Court issued the warrant of execution on January 8, 2013 and execution is scheduled to take place on March 6, 2013.

Defendant was convicted in 1979 of the murder of Lorimer Grove, and sentenced to death. The conviction and sentence were affirmed on direct appeal. *State v. Schad (Schad I)*, 129 Ariz. 557, 633 P.2d 366 (1981). Defendant then sought post-conviction relief, which the trial court denied. Upon petition for review, however, the Arizona Supreme Court reversed the conviction and remanded the case for a new trial. *State v. Schad (Schad II)*, 142 Ariz. 619, 691 P.2d 710 (1984).

At the 1985 retrial, defendant was again convicted by a jury of first degree murder. Following a sentencing hearing, the court found three aggravators proven, F1 (prior conviction in which sentence of life or death imposable), F2 (prior violent offense) and F5 (pecuniary gain), determined that the mitigation presented was not sufficiently substantial to overcome any one of the aggravators, and sentenced defendant to death. The Supreme Court again affirmed the conviction and sentence on direct appeal. *State v. Schad (Schad III)*, 163 Ariz. 411, 788 P.2d 1162 (1989).

Defendant then unsuccessfully pursued post-conviction and federal habeas relief. [2] The Ninth Circuit affirmed the district court's denial of habeas relief, and affirmed the conviction and sentence. *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011).

Defendant's Petition Exceeds the Mandatory Page Limitation

Initially, the Court notes that Rule 32.5, Arizona Rules of Criminal Procedure, mandates that the Petition for Post-conviction Relief not exceed 40 pages. A petition that "fails to comply with this rule shall be returned by the court to the defendant for revision with an order specifying how the petition fails to comply with the rule." Defendant's petition is 70 pages and he has not requested permission to file a petition not in compliance with Rule 32.5. However, because the Court determines that the claims raised by defendant can be addressed and resolved by reference to previous decisions in this matter, the Court declines to return the pleadings, which would serve to further delay the proceedings.

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[2] On December 16, 1991, defendant filed a *Pro Per* Preliminary Petition for Post-Conviction Relief raising 18 claims, including the ineffective assistance of trial counsel, the trial court's failure to consider the plea offer of a life sentence and his dysfunctional, abusive upbringing as mitigating factors, the Arizona Supreme Court's failure to appropriately weigh rehabilitation and exemplary conduct, and the ineffective assistance of appellate counsel. Although this Preliminary Petition was signed by defendant, it appears to have been prepared by Arizona Capital Representation Project counsel, including current counsel Denise Young.

On October 19, 1995, defendant, with assistance of counsel, filed a Supplemental Statement of Grounds for Relief, claiming newly discovered evidence regarding witness John Duncan, "material omissions" in presentence report, ineffective assistance of trial counsel, and prosecutorial misconduct alleging failure to disclose a witness' alleged status as a police agent. On March 27, 1996 the trial court dismissed the majority of the claims raised in both petitions with the exception of the IAC claims. Following additional briefing regarding these claims and several new ones (errors in criminal history and military service, and identifying a new, critical witness), the trial court addressed the remaining claims and dismissed the petition on June 21, 1996. The Arizona Supreme Court denied defendant's petition for review on September 16, 1997.

Claims Identified in Successive Petition

In this successive petition, the defendant raises six claims[3] for relief:

Claim 1: Ineffective assistance of counsel at sentencing (coupled with the ineffectiveness of post-conviction counsel in failing to develop the claim, citing *Martinez v. Ryan,* __ U.S. __, 132 S.Ct. 1309 (2012)).

Claim 2: Prosecutorial misconduct (State's failure to disclose impeachment evidence).

Claim 3: Sentencing judge applied "causal nexus" requirement to determine relevance of mitigating evidence, in violation of Eighth and Fourteenth Amendments.

Claim 4: Defendant's sentence is disproportionate to the crime, in violation of Eighth and Fourteenth Amendments.

Claim 5: Defendant's prior Utah conviction was unconstitutionally used as the F1 and F2 aggravators.

Claim 6: Defendant's sentence should be reduced due to his good character and conduct during 34 years of incarceration – the *Lackey*[4] claim.

Pursuant to Rule 32.6(c), the Court first identifies all claims that are procedurally precluded from Rule 32 relief. A claim is precluded if it was raised, or could have been raised, on direct appeal or in prior collateral proceedings. *State v. Shrum*, 200 Ariz. 115, ¶12, 203 P.3d 1175 (2009); *State v. Towery,* 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Claim 1: Ineffective assistance of counsel at sentencing

In Claim 1, defendant alleges, in essence, a "failure of mitigation to outweigh the aggravators" claim, faulting either trial counsel (failure to investigate and present evidence at sentencing) or post-conviction counsel (failure to raise the claim).

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[3] The Court attempted to follow defendant's outline of his Claims for Relief, running from pp. 21-70 of his Successive Petition, but was unable to follow the number/letter scheme; consequently, the Court has simply adopted as "claims" the listing set forth at pp. 1-4 of the Successive Petition.

[4] *Lackey v. Texas*, 514 U.S. 1045 (1995).

In *Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067 (2002), the Arizona Supreme Court instructed:

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

The defendant's claim fits squarely within the parameters addressed in *Stewart*. In his first Rule 32 proceeding, he claimed that his trial counsel provided ineffective assistance at sentencing by failing to investigate and present mitigation evidence. Thus, because he asserted an IAC claim in his first petition, the defendant is precluded from asserting IAC at sentencing in this successive petition. As *Stewart* instructs, "preclusion is required without examining the facts." 202 Ariz. at 450.

In addition, the Court finds that Claim 1 lacks merit, for the reasons set forth by the Ninth Circuit in *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). The Ninth Circuit noted that defendant presented additional mitigating evidence in support of his federal habeas petition and that the district court "held that even if the evidence were considered in federal court, the evidence did not show that sentencing counsel was deficient in failing to present it. The court ruled the strategy counsel pursued was competent and that the newly proffered evidence could not have affected the result." *Id.* at 722.

Finally, contained within Claim 1 is defendant's claim that his first Rule 32 counsel was ineffective for failing to raise a claim of IAC at sentencing. *See* Successive Petition at 21-22. Defendant claims that the alleged ineffectiveness of post-conviction counsel, undeveloped previously, is now viable under *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309, 1315 (2012).

The Arizona Supreme Court has repeatedly held that a claim that Rule 32 counsel provided ineffective assistance in a prior collateral Rule 32 proceeding is not a valid substantive claim under Rule 32. *State v. Mata,* 185 Ariz. 319, 333 n.9, 336-37, 916 P.2d 1035, 1049 (1996); *State v. Krum*, 183 Ariz. 288, 291-92, 903 P.2d 596, 599-600 (1995). This Court is bound to follow Supreme Court precedent.

Defendant ignores this precedent and instead relies on the United States Supreme Court's opinion in *Martinez*. The Court finds that *Martinez* does not squarely address the issue presented here. The issue addressed in *Martinez* concerned federal habeas law and specifically whether the acts or omissions of his attorneys constituted "cause" to excuse Martinez's procedural default. *Martinez* did not establish that a defendant has a federal constitutional right to effective assistance of PCR counsel.

Moreover, the United States Supreme Court has previously stated that "[t]here is no constitutional right to an attorney in state post-conviction proceedings.... Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman v. Thompson,* 501 U.S. 722, 752 (1991)(citations omitted). The Court has also noted that this is true even though there exists a state-created right to counsel on post-conviction proceedings after exhaustion of the appellate process. *Pennsylvania v. Finley,* 481 U.S. 551 (1987).

The Court finds that this portion of defendant's claim for relief is not cognizable in a Rule 32 proceeding under Arizona law.

Claim 2: Prosecutorial misconduct

In Claim 2, defendant alleges that the State failed to disclose impeachment evidence as to the witness John Duncan, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). The Court finds that this claim is precluded, pursuant to Rule 32.2(a)(3), because it could have been raised in the prior Rule 32 proceeding but was not.

The Court also finds Claim 2 lacks merit, for reasons set forth by the Ninth Circuit in *Schad v. Ryan.* Although the State conceded in the federal habeas proceeding that it should have disclosed the material, the Ninth Circuit agreed with the district court that the omission did not justify habeas relief because it resulted in little or no prejudice, given the extensive impeachment material already available to the defense. The court held that absent prejudice, the prosecutor's actions did not constitute a *Brady* violation. 671 F.3d at 714-16. Having been addressed by that court in a collateral proceeding, this claim also is precluded under Rule 32.2(a)(2).

Claim 3: Sentencing judge applied "causal nexus" requirement
Failure to Consider Mitigation

In Claim 3, defendant alleges that the trial court committed error in failing to consider mitigation evidence. This claim is precluded, pursuant to Rule 32.2(a)(2), because it was raised on appeal and the Arizona Supreme Court not only found that the trial court had properly considered mitigation, but also considered the mitigation in its own independent review of the death sentence. *Schad III,* 163 Ariz. at 421, 788 P.2d at 1172.

The Court also finds that Claim 3 lacks merit, for reasons stated by the Ninth Circuit in *Schad v. Ryan,* 671 F.3d at 722-25. That court found the "state courts did not unconstitutionally fail to consider mitigating evidence" and specifically stated:

> Absent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Edding's* constitutional mandates. ....
> Moreover, where, as here, the sentencing court states that it has considered all the mitigating evidence offered, we may not second-guess its actions. *See id.* ("This court may not engage in speculation as to whether the trial court actually considered all the mitigating evidence; we must rely on its statement that it did so.")."

671 F.3d at 725.

Claim 4: Capital sentence is disproportionate to crime

In Claim 4, defendant alleges that his sentence is disproportionate to the crime, on both constitutional grounds as well as based on the pre-trial plea offer that would have resulted in a life sentence.

The Court finds that Claim 4 is precluded, pursuant to Rule 32.2(a)(2), because it was raised and rejected by the Arizona Supreme Court on direct appeal. *Schad III*, 788 P.2d at 1173. In *Shad III,* the Court conducted an independent review and specifically determined that the death penalty was not disproportionate:

> After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. ... We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. ...We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. ...
>
> There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. ...We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment. ....
>
> Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

163 Ariz. at 422-23, 788 P.2d at 1173-74 (citations omitted).

Defendant's claim that the existence of a pretrial plea offer establishes the maximum penalty also lacks merit. Before trial commenced for the first time in 1979, the State offered defendant the opportunity to plead guilty to first degree murder and be sentenced to life imprisonment. Defendant alleges that in doing so, the State effectively established the maximum sentence that could be imposed for the crime, notwithstanding his rejection of the offer at that time.

A criminal defendant has no constitutional right to a plea agreement and the State is not required to offer one. *State v. Darelli,* 205 Ariz. 458, 461, 72 P.3d 1277, 1280 (App. 2003). The fact that the State has offered a plea agreement to defendant that he chose to reject does not thereafter bar the State from prosecuting him to full extent of the law. To hold otherwise would violate the separation of powers doctrine. The Court has no authority to reduce defendant's sentence to life imprisonment simply because pretrial the State offered him such a plea.

Claim 5: Unconstitutional prior conviction used as aggravators
Claim 5--Utah Prior Conviction

In Claim 5, defendant challenges the Utah conviction that the trial court found established the F1 and F2 aggravators.

The Court finds this claim is precluded, pursuant to Rule 32.2(a)(2), because it was raised and rejected by the Arizona Supreme Court on appeal. *Schad III*, 163 Ariz. at 418-19, 788 P.2d at 1169-70. Defendant was convicted of second degree murder in Utah in 1968. The murder occurred in connection with mutual acts of sodomy. Although the crime of sodomy was subsequently reduced to a misdemeanor in Arizona, in 1968 sodomy was a felony in both Utah and Arizona. Defendant claimed on appeal that because sodomy was subsequently reduced to a misdemeanor and there was no longer an offense of second degree felony murder in Arizona, his Utah conviction could not be used as a F1 or F2 aggravator. The Supreme Court rejected this argument, finding that it mischaracterized the nature of defendant's Utah conviction:

> In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. … The defendant concedes that pursuant to former A.R.S. §§ 13–453(B) and –1644, the maximum penalty for second-degree murder in 1968 was life imprisonment.… However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

> Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. *See State v. Schad,* 24 Utah 2d 255, 470 P.2d 246 (1970).
> ...
> The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but *the manner* in which it was performed. ...Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

Schad III, 163 Ariz. at 261, 470 P.2d at 250 (citations omitted).

In addition, even if defendant's claim had merit, he would not be entitled to relief. In its special verdict imposing the death sentence, the trial court found that the total mitigation was not sufficiently substantial to overcome *any one* of the aggravating circumstances. Defendant does not contest the pecuniary gain aggravator in his Successive Petition. As noted by the Arizona Supreme Court, the evidence "strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case." *Schad III*, 163 Ariz. at 261, 470 P.2d at 250. Thus, even if defendant's claim that the Utah conviction was improperly considered as an aggravating factor is colorable, any error is harmless because the pecuniary gain aggravator is sufficient to support a sentence of death.

Claim 6: Good character and conduct (*Lackey* claim)

Defendant's last claim is based on the United States Supreme Court's order denying certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). In *Lackey*, the Supreme Court declined to review a claim that execution of a defendant after he spent many years on death row would constitute cruel and unusual punishment. So-called "*Lackey* claims" have found no support in the courts that have addressed them. *See Allen v. Ornoski*, 435 F.3d 946, 958-60 (9th Cir. 2006) (surveying opinions, all rejecting asserted *Lackey* claims). The Arizona Supreme Court has similarly rejected *Lackey* claims. *See State v. Murdaugh*, 97 P.3d 844, ¶¶ 30-31 (Ariz. 2004); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997).

Defendant's potential for rehabilitation was considered by the Arizona Supreme Court in *Schad III*:

> The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitation ....Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors.
> ...

> We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency.

Schad III, 163 Ariz. at 421, 788 P.2d at 1172.

Defendant cites no authority and this Court has found none supporting his contention that it has the authority to reduce a lawfully-imposed sentence absent a finding of a constitutional violation. In *State v. Pike,* 133 Ariz. 178, 650 P.2d 480 (App. 1982), the defendant failed to attack his sentence under Rule 32.1 (b) or (c). Nonetheless, the trial court reduced the sentence based on the defendant's claim of rehabilitation. The Court of Appeals held that the trial court lacked jurisdiction to reduce a lawfully-imposed sentence that had been affirmed on direct appeal because there was no constitutional violation supporting Rule 32.1 relief.

Defendant also appears to assert that he is not precluded from relief at this late stage either because there has been a significant change in the law (Rule 32.1(g)) or that the underlying facts show the trial court would not have imposed the death penalty (Rule 32.1(h)). Neither provision obviates preclusion: as previously determined, *Martinez* is inapplicable, and the decisions of all the courts previously reviewing this matter have affirmed imposition of the death penalty. For this reason and because counsel has failed to set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner, the Court finds neither Rule 32.1(g) nor Rule 32.1(h) applicable.

The Court finds that defendant has failed to raise any colorable claims for relief and that no purpose would be served by any further proceedings.

IT IS THEREFORE ORDERED dismissing defendant's Successive Petition for Post-Conviction Relief.

DATED THIS 18th DAY OF JANUARY, 2013

Honorable David L. Mackey

cc: Kent Cattani – AAG, 1275 W. Washington, Phoenix, AZ 85007
Denise I. Young – 2930 N. Santa Rosa Place, Tucson, AZ 85712