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ATTORNEY FOR PETITIONER EDWARD H. SCHAD

IN THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA	)	
	)	ARIZONA SUPREME COURT
RESPONDENT,	)	NO. _____
	)	
V.	)	YAVAPAI CTY CASE NO. P1300CR8752
EDWARD H. SCHAD,	)	
	)	**PETITION FOR REVIEW,**
PETITIONER.	)	**OR IN THE ALTERNATIVE,**
_____	)	**MOTION TO RECALL THE MANDATE**

I. ISSUES PRESENTED FOR REVIEW

A. Is Petitioner's death sentence unconstitutionally disproportionate given his flawless 34-year record of extraordinary good conduct on Arizona's death row, and the State's pre-trial offer of a life sentence?

B. Does the execution of a person who has already served an effective life sentence for the same crime violate prinicples of double jeopardy?

C. Should the Petitioner's death sentence be reduced to life because two of the aggravating circumstances used by the trial court are based on a prior conviction for felony murder where the felony was consensual sodomy which is now constitutionally protected behavior and the conviction is unquestionably unconstitutional. *See Lawrence v. Texas,* 539 U.S. 558, 577 (2003)?

D. Did the Rule 32 court err in summarily dismissing Petitioner's petition for postconviction relief seeking relief from his unconstitutionaldeath sentence based on sentencing counsel's failure to investigate and present substantial and compelling mitigating evidence ?

E. Should this Court adopt the reasoning of *Martinez v. Ryan* as an exception to preclusion in Arizona state post-conviction petitions ?

II. REASONS WHY THIS COURT SHOULD REDUCE ED SCHAD'S CAPITAL SENTENCE TO LIFE IN PRISON OR ALTERNATIVELY GRANT REMAND HIS CASE FOR AN EVIDENTIARY HEARIBG ON THE CLAIMS RAISED IN HIS RULE 32 PETITION

The state postconviction court below erred when it issued its order denying, without a hearing or oral argument, Schad's petition for relief that presented important constitutional violations. Exhibit A. Schad explains the facts and law supporting his entitlement to relief on the constitutional violations he presents, or alternatively, a hearing where he can present these facts in this Petition[1].

A. Petitioner's Disproportionate and Unconstitutional Death Sentence Violated Sixth, Eighth and Fourteenth Amendments To the U.S Constitution and Priniciples of Double Jeopardy Where Schad Has Already Served An Effective Life Sentence

In his Petition for Postconviction Relief ("Petition"), Exhibit B, Schad requested relief from his death sentence because it was unconstitutionally disproportionate to his crime. Schad based that request on two key facts: The State's pre-trial offer to Schad of a life sentence in exchange for a guilty plea, and

[1] This case is in an emergency posture and the rules of the Court limit the pages available to explain why Schad is entitled to relief. Schad does not waive any constitutional or procedural claim of error and incorporates by reference any and all arguments raised in his postconviction petition, Exhibit B, which is supported by the accompanying evidence and declarations found at Exhibits C-T. To be clear each and every claim raised herein is based on Schad's rights to fundamental fairness, effective assistance of counsel, due process and to be free from cruel and unusual punishment as guaranteed by the United States Constitution and the Sixth, Eighth, and Fourteenth Amendments thereto as well as the correlative guarantees in the Arizona Constitution. Schad also raises a claim that his execution at this late date is violative of federal and state double jeopardy principles because he has now served an effective life sentence and the state wishes to punish him a second time by carrying out his execution. To the extent this Court finds Schad's claims non-cognizable in a Petition for Review from a Rule 32 proceeding, then this Court should recall its mandate in the direct appeal of this case and consider his claims under that procedural vehicle. Alternatively, this Court should exercise its inherent authority as the Supreme Court of Arizona and grant Schad relief to prevent the fundamental miscarriage of justice of the execution of a man who poses no threat to society, who has served his full life sentence with honor and dignity, and where no societal purpose will be served by extinguishing his life.

2) Schad's exceptional good conduct and flawless record throughout his 34-year incarceration on Arizona's death row. As Schad explained in his Petition, that offer demonstrates that the State, as well as others, did not find Schad to be deserving of a death sentence. Ex. B, p. 59; Exhibits S, T. The State's offer is not surprising given Schad's lengthy incarceration history as a model inmate. Indeed Schad has never received any disciplinary actions of any kind, and exhibits an extraordinary work ethic. But the state's action following Schad's rejection of its life-sentence offer is not only surprising; it is unconstitutional. The State's imposition of a death sentence following its conclusion that a life sentence was the appropriate sentence, and acted on its conclusion by offering Schad a life sentence violated the Sixth, Eighth, and Fourteenth Amendments. As Schad explained in the postconviction court below, when the State recognized the proper sentence was a life sentence, no reason existed not to impose the sentence it had determined both proper and just. Ex. B, p. 59-61; see also *Lockett v. Ohio*, 438 U.S. 617-18 (1978)(Blackmun, J., concurring)(Ohio death sentence unconstitutional under *U.S. v. Jackson*, 390 U.S. 570 (1968), where, upon pleading guilty, defendant would receive life, but defendant would face death sentence if he exercised his right to trial).

The central importance of the prosecutor's life sentence offer to Schad cannot be overstated: had the county attorney believed a death sentence based on the facts of the crime and Schad's actions was required, he would not have offered Schad a life sentence. The county attorney's life offer was appropriate, justified

and unsurprising, given Schad's unblemished prison record, and the support of correctional officers as to Schad's trustworthiness and good character. Indeed Schad has continued to demonstrate his good character and trustworthiness during his 34 years on Arizona's death row – more than he would have served had he taken the life offer. As one corrections officer who supervised Schad at the Florence prison complex explained:

> I was a maintenance supervisor at Florence State Prison for nine and a half years. I worked at CB6 for close to eight years during the 1990s.
>
> Ed Schad was assigned to me as one of four full time workers assigned to me. He worked for me for approximately seven years. I used him more than other inmates because he was easy to get along with, he never gave anyone any trouble and he [was] always cheerful about completing any tasks I asked him to do. He was a good worker, and he came up with some good ideas on how to do things better. He never gave the guards a hard time, was a willing worker, and conscientious about the prison rules.

Ronald Labrecque Declaration, Ex. S.

> Mr. Schad would be a good candidate for the open yard or population. He has never caused any problems, and has never had any infraction that I am aware of.

Correctional officer, Gabriel Lagunas, agreed, declaring:

> I have worked at the Arizona State Prison at Florence, Arizona for 24 years. I have known Ed Schad since 1990. I started as a correctional officer and am now a sergeant.
>
> Mr. Schad would be very quiet and mellow. He never caused any problems for anybody. I knew Mr. Schad at CB6 and then at the Browning Unit. Mr. Schad was very cooperative and respectful of the prison rules.

> Mr. Schad would be a good candidate for the open yard or general population. He has never caused any problems, and has never had an infraction that I am aware of. There are quite a few inmates there that I wouldn't trust, but Mr. Schad is not one of them.

Declaration, Ex. T.

These officers echo the testimony that was presented at Schad's sentencing hearing. For example, Stephen Love, a retired agent of the Utah Department of Correction who had met Schad following his Utah incarceration for an accidental death that occurred during consensual sodomy. R.T. 8-22-85, p. 34. Love testified at Schad's capital trial that he knew the facts supporting Mr. Schad's incarceration and based on those facts, and his interaction with and knowledge of Schad, he recommended Schad be paroled. *Id.*, p. 35. John Powers, a social worker and management auditor at the Utah prison, also knew Schad and testified he was a "model prisoner" throughout his incarceration. Then well-known Arizona psychiatrist Otto Bendheim interviewed Schad, and based on that interview, testified that although Schad's childhood was "miserable," he "has been an exemplary prisoner" and "made an honest attempt to rehabilitate himself in prison…." *Id.*, pp. 48-49, 51. After listening to this, and other testimony, the trial judge found in mitigation: Schad is "a personable, helpful prisoner who causes no problems," a "model prisoner" throughout his Utah and Arizona incarcerations, and in the Yavapai County jail, a "student and religious man," "trustworthy," "helpful, charitable," a reliable inmate who "possess[es] a good stable character," "proven to be a good worker," who has considerable friends and supporters for

whom he cares for and who care for him, "accepted into the Lutheran Church," and who suffered no drug or alcohol problems. R.T. 8-29-85, pp. 7-8.

That was not all. Then Chairman of the Arizona Board of Pardons and Parole, Dick Ortiz, testified in Schad's behalf at his sentencing. Ortiz knew Schad and the facts of his case well. He had reviewed it during his work as a board member, and knew that the Yavapai County attorney had offered Schad a life sentence. Ortiz was "troubled" by the case, stating:

> During [a previous hearing under warrant] and in the commutation phase, I believe I asked your client whether or not a plea agreement had been offered. His response at that time was yes, it had been. The concerned me somewhat. Because if a person, while maintaining innocence throughout and in exercising his constitutional right to a constitutional right to a jury trial, is found guilty and sentenced to death, after being offered a plea agreement, I find that to be somewhat disturbing.

R.T. 8-22-85, pp. 69-71, 75.

Given the prosecution's pre-trial life offer to Schad, its later request, and receipt, of a death sentence following Schad's capital trial violated the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, Schad requests this Court grant him relief on this claim and impose the sentence the State earlier agreed was appropriate. These facts demonstrate, as this Court concluded in *State v. Richmond,* 886 P.2d 1329 (Ariz. 1994), that the life sentence the State initially offered Schad following its review of the facts, is the proper, just and constitutional sentence. *Id.,* 886 P.2d at 1336 (Ariz. 1994)(discussing, *inter alia*, "evidence that defendant has apparently changed since his crime, persuades us that

we should reduce his sentence to life in prison and bring an end to this unfortunate saga."). *See also Adamson, supra*.

In denying this claim, the PCR court first found the claim precluded on the ground that it had been "raised and rejected by the Arizona Supreme Court on direct appeal." Ex A, p. 6, citing "Schad III, 788 P.2d at 1173." A review of *State v. Schad*, 788 P.2d. 1162 (Ariz. 1989), however, reveals no mention, much less any discussion by this Court of either the fact, importance or consequence of the State's life offer to Schad. This Court did conclude that "[n]othing in the present case leads us to consider that death is a disproportionate punishment," and that "[t]he defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment," *id*, at 1173-1174, but this Court has reduced a defendant's death sentence under circumstances similar to those here. *See Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988)(en banc)(finding it arbitrary to impose death sentence following breach of plea agreement after petitioner had initially pleaded guilty and received 48-49 year sentence which state and judge initially agreed was an appropriate penalty); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)(state may not arbitrarily impose death sentence).

Futhermore this claim is not precluded for the additional reason that it is supported by new facts, including Schad's now 34-year record of excellent conduct, and by *Richmond*, *supra* (despite two murder convictions, "evidence of defendant's change character [] necessarily impacts the weight of the (F)(1) factor here. If defendant is indeed changed, as the evidence strongly suggests, he is no

longer the same person he was when he committed either of those crimes.") *Id*., 886 P.2d at 1336 (emphasis added). The facts demonstrating Schad's character are as strong, if not stronger, than those in *Richmond*.

If the Court finds that the preclusion ruling of the lower court is well-taken then this Court should recall its mandate and reconsider the proportionality of Schad's sentence. In so doing, the Court should consider the changed circumstances of Schad's unprecedented, superior conduct while incarcerated, the fact that this Court had reduced capital sentences in much more egregious circumstances, *see e.g. State v. Wallace*, the fact that, as explained below, two of the aggravating circumstances are unquestionably unconstitutional under evolving standards of decency, and the wealth of newly discovered mitigating evidence that was presented to the Rule 32 court. Exhibits B-T. Plainly, Ed Schad is not even close to the "worst of the worst." No public interest will be served by his execution and this Court has the inherent authority to prevent such a miscarriage of justice. It should exercise it here.

B. Does the execution of a person who has already served an effective life sentence for the same crime violate principles of double jeopardy

Schad incorporates the arguments set forth above here. Furthermore when one considers that Schad has already served the sentence that was offered to him pre-trial, life in prison, his execution now constitutes a second punishment which violates constitutional principles of double jeopardy, fundamental fairness, due

process, and constitutes cruel and unusual punishment. This Court should reduce Schad's sentence to life in prison.

C. Should the Petitioner's death sentence be reduced to life because two of the aggravating circumstances used by the trial court are based on a prior conviction for felony murder where the felony was consensual sodomy which is now constitutionally protected behavior and the conviction is unquestionably unconstitutional? *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003)?

Schad also seeks this Court's relief on the unconstitutional prior conviction the State used to support his death sentence. This Court found two aggravating circumstances based on an accidental death that occurred in Utah during a consensual act of autoerotic asphyxiation ("AEA"). The facts show that at some unknown time Schad was present in the home of a friend, Clare Mortenson, a homosexual man-known to participate in AEA on a "rather regular basis." R.T. 8-22-85, p. 31; *State v. Schad*, 470 P.2d 246 (Utah 1970). The medical examiner who conducted Moretenson's autopsy concluded his death was "accidental," and the physical evidence supported that conclusion. *Id*. Under the law at the time Schad's death sentence was first imposed, and today, Schad could not be sentenced for second-degree murder in either Utah or Arizona. But Schad was nonetheless tried and convicted of second-degree murder, with sodomy used as the underlying felony. *State v. Schad*, 788 P.2d 1162, 1169 (1989). The State introduced that conviction at Schad's capital trial to request the judge find two aggravating factors to support a death sentence: 1): §13-454(E)(1)—the defendant was convicted of another offense for which under Arizona law a life or death

sentence was imposable, and 2): § 13-454(E)(2)-a prior felony conviction involving use or threat of violence on another. At his first sentencing, the trial judge found both aggravating circumstances to exist. But the judge found no other aggravators to support death. *State v. Schad*, 633 P.2d 366, 328 (1981). In mitigation, the court found Schad a "model prisoner," and its issuance of a "felony murder instruction" mitigating. *Id*., at 383.

That conviction and sentence were later overturned based on the trial court's failure to define the underlying felonies to the jury, and additional litigation occurred in the U.S. Supreme Court that is not relevant here. *See e.g., Schad v. Arizona*, 501 U.S. 624 (1991) (affirming this Court's decision). The postconviction court below ruled that Schad's challenge to the Utah conviction and the trial court's finding of the (F)(1) and (F)(2) aggravating circumstances were precluded because they had been previously "raised and rejected" by this Court on appeal. Ex. A, pp. 7-8, citing *Schad III*, … 788 P.2d at 1169-70 ("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…."). But as Schad explained, in the proceedings below, Ex B, "[t]ime has shown Schad's 1968 conviction is not relevant to his sentence here. While social mores at the time when states were carrying out executions in an unconstitutionally cruel and unusual manner may have regarded a person's sexuality or sexual conduct to be a fair basis for choosing to execute him, evolved standards of our society and legal

system now recognize such matters are an 'integral part of human freedom.'" *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Now that the United States Supreme Court has held in *Lawrence* that it is unconstitutional to criminalize mutual acts of consensual sexual activity, it is clear that Schad's prior conviction is based as it is on a consensual sexual act, is void. This claim cannot be precluded for a previous determination where the basis of the claim did not yet exist.

This Court should reconsider Schad's prior conviction sentence based on this change in the law, and strike these two aggravating circumstances. This court should then reweigh all of the mitigating evidence, including the newly presented mitigation evidence, Schad's pristine incarceration history, and the fact that he was originally offered life (a sentence he has now served), against the single remaining aggravating circumstance, pecuniary gain. In so doing, this Court should take into consideration that pecuniary gain was NOT found by the first sentencing judge. Had the first sentencing judge not used this unconstitutional conviction to support the initially imposed death sentence, Schad would not have been subject to a death sentence on re-trial. Given all of these factors, the Court should reduce Schad's Sentence to Life in Prison.

D. Did the Rule 32 court err in summarily dismissing Petitioner's petition for postconviction relief seeking relief from his unconstitutional death sentence based on sentencing counsel's failure to investigate and present substantial and compelling mitigating evidence?

In his Rule 32 Petition below, Schad presented newly discovered evidence, including extensive medical records, employment records, VA records, and witness declarations that establish a *prima facie* case of ineffective assistance of sentencing counsel. Exhibits B-T. The first declaration, from psychologist Charles Sanislow, provided an extremely detailed discussion of the psychological impact of Edward Schad's abusive childhood. Ex. N. After reviewing extensive records and documents, including historical family, social, developmental, psychological and institutional records, concerning Schad and his family members, and meeting and interviewing Schad, Dr. Sanislow concluded that Schad "was born to a family environment marked with frequent physical abuse, emotional neglect and abandonment, mental illness, chemical dependency and severe stresses at every stage of his life. These stressors had a profound impact on him and increases his susceptibility for developmental, psychological and debilitating mental disorders. The chronic trauma and intense grief present in his family produced family patters of psychosis and emotional neglect that took away the ability for Ed Jr. and his family to develop and sustain healthy, responsive relationships critical to developing a healthy psyche. Grief and trauma that is left unresolved not only leads to profound sadness or clinical depression but can also alter the structure and function of the brain and decrease the effectiveness to responding to future stressful events. Ed. Jr's mother and father created an environment filled with unrelenting and unpredictable chaos and psychosis and stressful events that placed their children at risk for developing clinically significant mental illness and

possibly alterations in brain function. Predictably, it appears that Ed Jr. and his siblings suffered from significant and sometimes chronic mental illnesses and the impaired psychosocial functioning that is part and parcel of these disorders. Ex. N, pp. 462-463.

Dr. Sanislow concluded that Schad "exhibited many symptoms indicative of a severe and chronic mental illness, " and that "his history of abuse, neglect, and abandonment cannot be ruled out as playing a significant factor in Ed Jr.'s psychiatric and behavioral functioning as an adult. …. His behavior is consistent with mental illness in the affective spectrum, specifically some type of bipolar affective illness. Throughout his life, he has often exhibited symptoms of paranoia, anxiety, and mania, and his presentation is complicated by his history of trauma. Signs of a though disturbance are present at times in his speech patterns. … It is tragic that there was no one able or available to intervene in Ed Jr's stressful, traumatic, and disordered family situation during his life." *Id*., pp. 90-91.

The second declaration, from psychologist Leslie Lebowitz, addressed the mental health history of Schad's parents, including his mother's struggle with prescription drug addiction and his father's affliction with post-traumatic stress disorder due to spending eighteen months in a German POW camp during World War II. Ex. R. Declarations from Schad's mother and aunt provided details regarding Schad's father's severe alcoholism and the abuse he inflicted upon his family. Ex. R. Dr. Lebowitz found that Schad's "parents were so burdened by

psychological and substance abuse problems that neither could parent effectively. Mr. Schad [Petitioner's father] suffered from florid posttraumatic symptoms, as well as severe alcoholism and a psychotic disorder that left him completely disabled, both as an individual and as a [parent]. Further, he tended to act out his illness, thereby inflicting his disordered and violent world upon his children in frightening and traumatizing ways. [His mother] was so disengaged from her children that her behavior meets clinical criteria for neglect, its own category of severe child maltreatment." *Id*., p. 21. Dr. Lebowitz explained, too:

> It is generally accepted that neglect, exposure to violence, a chaotic family environment, and untreated mental illness in a parent can, and often do, impede normal development and foster the development of mental and behavioral pathology. Because these factors can be so devastating to healthy development, they are widely discussed in both the medical and psychological literature. Children growing up in the shadow of even one of these problems are considered to be at greater than average risk of developing serious behavioral and psychological conditions. Sadly, the Schad children struggled to cope in a family characterized by all of these impairments."

Id.

The Rule 32 court summarily dismissed this claim without review of the evidence as precluded. This was error. As discussed below, the Rule 32 Court should have ordered an evidentiary hearing so that Schad could present evidence to rebut the preclusion ruling. This Court should reverse the summary decision of the Rule 32 Court and remand for a hearing.

E. Should this Court adopt the reasoning of *Martinez v. Ryan* as an exception to preclusion in Arizona state post-conviction petitions?

Schad originally sought postconviction relief in the Yavapai Superior Court where counsel, Rhonda Repp, was eventually appointed to represent him.[2] Repp requested appointment of a mitigation expert to aid her in her representation of Schad, but her request for appointment was "lost in the system" for months, and little, if any, action undertaken. *See Schad v. Ryan*, 671 F.3d 708, 720-721 (9th Cir. 2011)(" The state court ordered Schad to file a supplemental petition by February 18, 1992, and Schad's legal team requested and obtained seventeen successive extensions of that deadline. During that time, post-conviction counsel obtained appointment of an investigator to look into Schad's family history."). Although trial counsel never contacted Schad's family or conducted an independent, thorough investigation into his life history, postconviction counsel did little to discover the facts of Schad's life. Postconviction counsel submitted some declarations from her mitigation expert, but the information her expert obtained was based solely from her conversations with Schad. *Id*., at 721.

After postconviction counsel sought additional time and funds to investigate, the State objected because postconviction counsel had not established a causal connections between the mitigating evidence and the crime—a connection the State argued had to be established in the Postconviction Petition to support relief. See Exhibit F ("[T]he burden is on Defendant to establish that [the

[2] Schad was assisted in the filing of his *pro se* petition by undersigned counsel, Denise Young. Ms. Young had represented Schad in proceedings before the United States Supreme Court. Ms. Young was also the Director of the Arizona Capital Representation Project. In the petition, Ms. Young explained that she had not conducted any investigation in the case, had only represented Mr. Schad for a short period of time and only in the United States Supreme Court, and that she could not accept appointment as counsel in the Rule 32 proceedings. A series of post-conviction counsel were then appointed, did nothing, and then moved to withdraw.

mitigation] had a direct affect [sic] on his conduct at the time. [of the crime'"). The postconviction court agreed and denied all relief on the bar and unsupported claim. Exhibit I ("… Defendant is simply asking to go on a fishing expedition with no showing of what would be turned up that the court did not already know at sentencing time and how that might effect sentencing. The claim has no merit.").

Had postconviction counsel conducted the investigation she was obligated to conduct, *see e.g., Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2468-69 (2005), she would have discovered valuable facts and information supporting a life sentence. The Rule 32 Court found this claim precluded and summarily dismissed the claim without reviewing the evidence presented. See Exhibit A.

In its order denying Petitioner Edward Schad a hearing and all relief, the postconviction court concluded – "without examining the facts" - that Schad's ineffective counsel claim—based on trial counsel's failure to conduct the thorough investigation the law required, is "precluded." Order (Jan. 18, 2013), pp. 1, 4, citing *Stewart v. Smith*, 46 P.2d 1067 (2002). But unlike *Stewart*, *supra*, Schad's current postconviction petition was filed following the U.S. Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (U.S. 2012) and after the discovery of new facts supporting the claim. In *Martinez*, the Court addressed the question of "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for the procedural default in a federal habeas proceeding." *Id*., at 1315. It concluded:

"To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* [*v. Thompson*, 501 U.S. 722 (1991)], that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." The Court announced "a narrow exception: Inadequate assistance of counsel at initial review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id., Martinez*, supra, at 131801319. Based on that law, courts have permitted petitioners, like Martinez, to assert postconviction counsel's ineffectiveness in a successor postconviction petition.

The postconviction court below, however, ruled "that *Martinez* does not squarely address the issue presented here" because "*Martinez* concerned federal habeas law and specifically whether the acts or omissions of his counsel constituted 'cause' to excuse Martinez's procedural default," and did not establish a defendant's "federal constitutional right to effective assistance of PCR counsel," and citing *Coleman, supra,* held that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings," "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Order., pp. 4-5. Therefore, the Court ruled, *Martinez* does not provide a defense to preclusion under Arizona law. This Court should hold that it does. *Martinez* explained:

> [W]hen a State requires a prisoner to raise an ineffective-assistance claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two

> circumstances….The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 … (1984).

Id., p. 14.

There is little doubt of postconviction counsel Repp's ineffectiveness at Schad's key postconviction proceedings. Following her appointment, Repp requested appointment of a mitigation expert, Holly Wake. Wake's mitigation investigation, however, was limited. She met with Mr. Schad, gathered some institutional records, and filed declarations addressing her need for more time to complete her investigation of Mr. Schad's life. Postconviction counsel made one telephone call to a family member. Neither postconviction counsel nor her mitigation expert met any member of Mr. Schad's family.

Postconviction proceedings, and the key investigation that postconviction counsel was obligated to undertake, were particularly important here where Petitioner's trial counsel had based his case for life on a handful of witnesses who knew Schad either through correspondence, church membership, or as a result of his incarcerations in Utah and Arizona. Had postconviction counsel undertaken a thorough (and diligent) investigation into Schad's family and life experiences-an investigate the law required she undertake, see *Schad v. Ryan*, 606 F.3d 1022, 1044 (9th Cir. 2010), she would have discovered powerful facts supporting a life sentence. *See e.g., Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011)("Schad sought to present mitigating evidence not submitted during sentencing or during his state

post-conviction proceedings, including extensive mental health records of his mother, father, and brother, as well as several declarations discussing Schad's childhood and its effect on this mental health. The first declaration, from psychologist Leslie Lebowitz, discussed the mental health history of Schad's parents, including his mother's struggle with prescription drug addiction and his father's affliction with post-traumatic stress disorder due to spending eighteen months in a German POW camp during World War II. Declarations from Schad's mother and aunt provide details regarding Schad's father's severe alcoholism and the abuse he inflicted upon his family.").

This Court should recognize ineffective assistance of post-conviction counsel as an exception to preclusion and remand Schad's case for a hearing on his claims of ineffective assistance of counsel.

III. CONCLUSION

Schad requests this Court vacate the postconviction court's order below, grant the petition for review, and following its review, grant Schad a new trial and/or sentencing where he can present these facts supporting a sentence less than death. Alternatively, Schad requests this Court to recall the mandate in the opinion from the direct appeal and after a full and fair consideration of Schad's claims reduce his death sentence to life in prison. As a further alternative, Schad requests this Court to Exercise its inherent authority to reduce Schad's sentence to life in prison to preven the fundamental miscarriage of justice which would result from Schad's execution.

Respectfully submitted, this 17th day of February, 2013

/s/ Denise I. Young
Denise I. Young
Attorney for Petitioner Edward Schad

Copy of the foregoing was emailed this 17th day of February, 2013, to:

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