

DENISE I. YOUNG
AZ BAR NO. 007146
2930 N. SANTA ROSA PLACE
TUCSON, AZ 85712
(T) (520) 322-5344
(F) (520) 322-9706
EMAIL: DYOUNG3@MINDSPRING.COM

ATTORNEY FOR EDWARD H. SCHAD

IN THE SUPERIOR COURT OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA)	
)	
Respondent,)	No. CR 163419
)	
v.)	
)	
EDWARD H. SCHAD)	PETITION FOR
)	POSTCONVICTION RELIEF
Petitioner.)	
)	
)	

Defendant Edward Schad, ADC No. 40496, is a prisoner in state custody under sentence of death in Arizona. He was charged, tried, convicted and sentenced to death for the first degree murder of Lorimer Grove in 1979. *State v. Schad*, 633 P.2d 366, 370 (Ariz. 1981). Schad is incarcerated in the Arizona State Prison, Eyman Complex, Browning Unit, P.O. Box 3400, Florence, AZ 85132.

As explained below, Schad requests this Court grant him relief on the following grounds:

1) Schad received constitutionally ineffective assistance of counsel at sentencing in violation of the Sixth, Eighth, and Fourteenth Amendments. This claim was not previously developed in state post-conviction because of postconviction counsel's gross ineffective assistance in prior proceedings in this Court. The Supreme Court's

recent decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), clears the path for Schad to present this fully developed claim to this Court for the first time. See *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012)(“under *Coleman v. Thompson*, 501 U.S. 722, 753-754 ... (1991), an attorney’s errors in a postconviction proceeding do not qualify as cause for a default” because “there is no constitutional right to counsel in collateral proceedings.”).

2) Prosecutorial misconduct in failing to disclose key impeachment evidence on the credibility of the State’s principal witness, John Duncan, who, despite a “lengthy criminal history,” the State’s attorney and its detective had promised to, and did, write letters on Duncan’s behalf to California authorities requesting “Duncan’s sentence be reviewed and if possible, his sentence be modified in light of his contribution to criminal justice” in exchange for his testimony, *Schad v. Ryan*, 671 F.3d 708, 714 (9th Cir. 2011). *Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 763 (1972).

3) In violation of the Eighth and Fourteenth Amendment the sentencing judge applied of Arizona’s unconstitutional causal nexus requirement that held that the mitigation evidence not causally related to the crime was not relevant to the sentencing calculus. This now repudiated requirement resulted in the sentencing judge’s failure to credit, if not outright reject, Schad’s mitigating evidence supporting a life sentence, see *Tennard v. Dretke*, 542 U.S. 274, 284-287 (2004)(rejecting the circuit court’s need to establish a nexus to the facts of the crime before the court can find a defendant’s mitigating evidence constitutionally relevant.)¹

¹The Arizona courts have since repudiated its causal connection requirement following the U.S. Supreme Court’s rejection of the nexus test in *Tennard*, *supra*. See *Schad*, *supra*, 671 F.3d at 722-723. See Capital Sentencing Guide, Arizona Supreme Court,

4) Schad's capital sentence is disproportionate and unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The State's offer, pre-trial, to Schad to plead guilty in exchange for a life sentence is evidence that Schad is not the worst of the worst and that no societal need exists for his execution. *See Adamson v. Lewis*, 955 F.2d 614, 617 (9th Cir. 1992) (holding "the

Publications and Reports, visited December 10, 2012 ("The Causal Nexus/Connection: DO NOT EMPLOY THIS TEST TO EXCLUDE EVIDENCE FROM GOING TO THE JURY. Arizona case law is replete with the use of a 'causal connection' or 'nexus' test, which questions whether there is a link between the impairment, be it alcohol abuse, substance abuse or mental illness, and the murder itself. See [*State v.*] *Kayer*, [984 P.2d 31 (1999)]; [*State v.*] *Murdaugh*, 209 Ariz. 19, 34, ¶ 74, 97 P.3d 844, 859 (2004)("the defendant must establish a causal nexus between the drug use and the offense"); *State v. Sansing*, 206 Ariz. 232, 239, 77 P.3d 30, 37 (2003)("Mere evidence of drug ingestion or intoxication is insufficient to establish statutory mitigation. The defendant must also prove a causal nexus between his drug use and the offense.").

At the time Schad's postconviction proceedings were litigated in this Court, the State explicitly urged this Court to reject Schad's mitigation because Schad had not established a causal link between his mitigation evidence and the acts at the time of the crime. The State explained: "With respect to Defendant's allegation of child abuse, it should be noted that before such evidence is considered mitigating, the burden is on the Defendant to establish that it had a direct affect [sic] on his conduct at the time [of the crime.]" As the Arizona Supreme Court recognized years later, *supra*, n. 1, it had a long, established history of rejecting relevant mitigating evidence supporting a sentence less than death where the petitioner did not establish a causal connection between his acts at the time of the crime, and the proffered mitigation. *See also State v. Doerr*, 969 P.2d 1168 (1998)(despite evidence showing an abusive family history, dysfunctional childhood, and low IQ (80), "a difficult family background," is not mitigating in the absence of 'some connection with the defendant's offense-related conduct' and the court "found no proof of a causal connection to the crime." *Id.*, *supra*, at 1182; *See e.g.*, *State v. Wallace*, 773 P.2d 989, 986 (1989)("[E]vidence [] that his father was an alcoholic," "his mother suffered from a severe mental illness that required hospitalization" and Wallace "was reared in a violent environment" not enough. "A difficult family background, in and of itself, is not a mitigating circumstance." *Id.* It is only "a relevant mitigating circumstance if a defendant can show that something in his background had an effect or impact on his behavior that was beyond the defendant's control." *Id.*

State's decision to seek the death penalty after previously agreeing to a term of imprisonment raised a presumption of prosecutorial vindictiveness sufficient to warrant a remand to the district court for an evidentiary hearing...."); *United States v. Jackson*, 390 U.S. 570, 580 (1968).

5) Two of the aggravating circumstances used to sentence Schad to death are based on an unconstitutional prior conviction. In violation of the Eighth and Fourteenth Amendments to the United States Constitution, no court has ever properly reweighed the mitigating evidence once removing the unconstitutional aggravators from the sentencing calculus;² and

6) Schad's extraordinary, unblemished record of good character and conduct throughout his 34-year incarceration on Arizona's death row that includes the complete absence of disciplinary actions, excellent work ethic and pursuit of available educational opportunities, interactions with prison counselors, guards, wardens and others at the prison facility make clear that to execute Schad now, after he has effectively served a life sentence, would violate the Eighth and Fourteenth Amendments and evolving standards of decency. *See, e.g., Lackey v. Texas*, 514 U.S. 1045, (1995); *State v. Richmond*, 886 P.2d 1329, 1336 (Ariz. 1994)(despite two murder convictions, "evidence of defendant's changed character [] necessarily impacts the weight of the (F)(1) factor here. If defendant has indeed changed, as the evidence strongly suggests, he is no longer the same person he was when he committed either of these crimes.").

²To support Arizona's aggravating factor of a prior conviction punishable by a life sentence or death, the trial court relied on Schad's 1968 conviction of second-degree felony murder in Utah. That conviction was based on a consensual act of sodomy. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562-571 (discussing, *inter alia*, "longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* [*v. Hardwick*], 478 U.S. 186 (1986), decision placed such reliance....").

Addressed more below, the evidence supporting Schad's capital conviction is circumstantial: Schad had possession of Grove's car, and its contents that included Grove's wallet and credit cards. *State v. Schad*, 633 P.2d at 370. Schad has never denied his theft, and resulting possession of Grove's car and its contents. He has consistently denied any participation in Grove's death. Equally central to these proceedings, Schad's prior second-degree felony conviction in Utah for participating in a consensual act of sodomy does not establish an aggravating circumstance supporting a sentence of death.³

At the time of Petitioner's 1985 trial, Arizona law required trial judges alone determine the existence of aggravating factors rendering a defendant eligible for capital punishment, and alone determine the sentence—here whether Schad lived or died. *See State v. Schad, supra*, at 382-383. The U.S. Supreme Court has since invalidated this aspect of Arizona's capital sentencing scheme in *Ring v. Arizona*, 536 U.S. 584, 588 (2002) (“capital defendants... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment,”), but then held *Ring* did not apply retroactively to cases such as Petitioner's that were final on direct review at the time *Ring* was decided, even though Schad had specifically objected to the unconstitutional judge sentencing at the time of trial. *See Schriro v. Summerlin*, 542 U.S. 348, 352-353 (2004)(concluding *Ring*'s holding that a sentencing judge alone may not

³The Utah state court charged Schad with first degree murder in 1968, but the trial judge did not submit that charge to the jury, and instead acquitted Schad of that charge. Schad was convicted of second-degree murder based on the underlying felony of consensual sodomy. During that proceeding, when asked to opine on the manner of death, the state medical examiner responded: “I think the most probable situation is that... death occurred as an accidental event in the court of this activity.” R.T. 8-22-85, p. 10. The following year Utah reduced the crime of sodomy from a felony to a misdemeanor. §76-53-22, Utah Code Ann. (1952), amd. Laws 1969, Ch. 244, §1. *See also Von Atkinson v. Smith*, 575 F.2d 819, 821 (10th Cir. 1978)(Appellee “charged with and pleaded guilty to the crime of sodomy with no mention whatever of force. The Utah legislature, in its wisdom, reduced that crime to a misdemeanor....”).

find the aggravating circumstance needed to support a death sentence is “properly classified as procedural” and “did not alter the range of conduct Arizona law subjected to the death penalty.”⁴

I. BACKGROUND

A. The Capital Trial Proceedings

At his capital trial, Schad was represented by attorney Anthony Shaw. Following Schad’s conviction of first degree murder, Shaw presented witnesses at Schad’s capital sentencing hearing to support a life sentence. His first witness, Stephen Love, was a now retired agent of the Utah Department of Corrections. He testified that he met Schad during Schad’s incarceration in Utah, and he knew that Schad’s incarceration resulted from an accidental death that had occurred during an act of consensual sodomy. R.T. 8-22-85, p. 34. Based on these facts, and his knowledge of Schad, Love testified that he had recommended Schad’s parole from the Utah prison. *Id.*, p. 35.

Trial counsel presented, too, testimony from psychiatrist Otto Bendheim who testified, based solely on his interview of Schad, that Schad’s childhood was “miserable,” and that none of Schad’s “offenses” had been “of a violent nature” except for the one for which he had now been convicted. *Id.*, p. 48. Bendheim testified as well that he “was aware of the” the conviction and circumstances surrounding his Utah conviction for an accidental death that resulted in his incarceration, and that “the attorney, the investigator,

⁴ See also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“[I]t is unconstitutional for a legislature to remove from the jury the assessment of fact that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”)

the coroner, the probation officer, all these people stating that they do not believe that this man did it.” *Id.*⁵

Bendheim testified as well that he had read Schad’s “history:”

[A]side from these two incidents where he was convicted of homicide, there is no incident in his long history of offenses, of violence, dangerousness, assaultiveness, belligerence. He stole cars, he forged checks, he did all that, but he never attacked anybody. And when I saw him on two occasions, I was very comfortable with this man. I wasn’t a bit afraid for my own safety when I talked to him for, you know, two, three hours.”

Id., pp. 48-49. Bendheim also testified that Schad “was a deprived youngster, an unloved child sent from pillar to foster home to foster home and he became delinquent very early in life.” *Id.*, p. 51. Bendheim testified, too, that Schad “has been an exemplary prisoner” and has “made an honest attempt to rehabilitate himself in prison....” *Id.*

John Powers, a social worker and management auditor for the Utah State Prison testified that he knew Schad during his incarcerated and “worked extensively with Ed until his parole.” *Id.*, p. 58. Powers testified that Schad a “model prisoner” through his incarceration. *Id.*, p. 60. Powers was concerned that “because of his childhood and lack of family support, and his relationship with Wilma Ehrhardt, who Powers believed, based on “her psychological make up was about the worst person that Ed could become involved with, and was not a “suitable sponsor” for Schad. Powers testified, too, that Schad was under “a lot of stress” in trying to find employment. *Id.*, p. 63.

The testimony established as well, and the trial judge expressly found in mitigation, that Schad is “a personable, helpful prisoner who causes no problems,” R.T. 8-29-85, pp. 7-8, a “model prisoner” throughout his Utah and Arizona incarcerations, and

⁵The record does not reveal any investigation or contact undertaken by trial counsel with Schad’s family and/or relatives.

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 whom he cares for and who care for him, “accepted into the Lutheran Church” and who suffered no drug or alcohol problems. *Id.*, p. 7. The court found, too, that Schad has taken “many college courses and earned superior grades.” *Id.*, p. 8. Importantly, the chairman of the Arizona Board of Pardons and Parole, Dick Ortiz, testified in Schad’s behalf at sentencing, urging the trial judge impose the life sentence the Arizona prosecutor had earlier offered Schad. R.T. 8-22-85, pp. 69-71. Ortiz testified he knew of Schad’s case, reviewed it many times in his capacity as board member, knew Schad had been offered a life plea by Yavapai County attorney Bill Hicks, and that Schad’s case “has troubled [him].” *Id.*, p. 73. Ortiz explained:

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. That concerned me somewhat. Because if a person, while maintaining his 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.”

Id., p. 75. Ortiz added: “Well, that’s why I voted the way I did.” *Id.*

Sentencing counsel presented additional witnesses who knew Schad as well: 1) Janet Bramwell, an organist at the King of Glory Lutheran church, who knew Schad as a member of the congregation for the last three years, and is now a close friend of Schad’s, noting Schad’s efforts in taken “numerous college courses through Central Arizona College,” had been “nominated onto the national dean’s list,” 2) Frank Terry, a major at the Arizona Department of Corrections, who testified that Schad had “no disciplinary

files” and no “write-ups, during his incarceration. *Id.*, pp. 93-96, 3) Jerry McKean, a Yavapai County deputy jailer who testified that Schad has “never been a disciplinary problem or anything with the jail,” and gets “along well with the other jail personnel,” “keeps the cell block, you know, kind of in line I’d say....” *Id.*, pp. 100-101; 4) Ronald Koplitz, then senior institutional chaplain for the Maricopa County jail system, testified that he had known Schad for more than two years, testified that Schad: really stands out as the kind of inmate you can like, and the kind of inmate that does not play games or try to con you like some of, you know, some of the inmates do for religious reasons.” *Id.*, p. 105. He summed up his thoughts about Schad:

He has always impressed me as one who really believed what he was talking about when we were talking about the Bible and about theology and so on....I really felt he was sincere in what he was telling me and talking to me about in regard to religion.... I doo have seen his many talents, I have seen his art work, I have seen the results of what he is doing and I just, you know, can’t help but feel he has to be a productive member of society if he is given that opportunity again after he serves a life sentence and you know, with the possibility of parole.”

Id., p. 108. *See also*, pp. 129-131 (testimony of Jimmy Stamps, prison counselor testifying to Schad’s good behavior, and lack of disciplinary write-ups.”).

Trial counsel contacted no members of Schad’s family, and the records show no efforts of any kind undertaken to contact his family. As a result, the only information about Schad’s background was that contained in the presentence report prepared by the court presentence writer.

The testimony established, and the trial judge expressly found in mitigation, that Schad is “a personable, helpful prisoner who causes no problems,” R.T. 8-29-85, pp. 7-8, 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 whom he cares for and who care for him, “accepted into the Lutheran Church” and who suffered no drug or alcohol problems. *Id.*, p. 7. The court found as well that Schad has taken “many college courses and earned superior grades.” *Id.*, p. 8. The chairman of the Arizona Board of Pardons and Parole, Dick Ortiz, testified in Schad’s behalf at sentencing, urging, too, the trial judge impose the life sentence the Arizona prosecutor had earlier offered Schad. R.T. 8-22-85, pp. 69-71.

However, the judge ruled that Schad’s “signs of rehabilitation” and “good stable character” were “not particularly weighty” given his lengthy incarceration, and Schad’s “unfortunate childhood” not a “persuasive mitigating circumstance in this case.” R.T. 8-29-85, p. 8.⁶ The judge rejected Schad’s argument that the State’s earlier plea offer to a life sentence limited his “sentencing prerogatives,” but he then failed to address or consider this extraordinary fact in determining the appropriate sentence. *Id.*, p. 9. The judge instead found Schad’s “most persuasive mitigating circumstances” were “model prisoner, a student and religious man with many supportive friends.” *Id.* The judge announced as well that he had “carefully considered” “[a]ll other mitigating circumstances,” but he never explained or supported why Schad’s “total mitigation” that included “[n]umerous mitigating circumstances,” including the State’s life offer, were “not sufficient to overcome any one of the aggravating circumstances.” *Id.*, p. 10.

The statutory aggravators the trial judge concluded outweighed Schad’s mitigating evidence were three: 1) Schad’s second degree murder conviction in Utah

⁶As we address below, sentencing counsel’s investigation into Schad’s background was, unfortunately, woefully incomplete, and to Schad’s extreme detriment, postconviction counsel, too, failed to conduct the key investigation needed to support relief, and as a result, failed to demonstrate the resulting prejudice Schad suffered.

based on an accidental death resulting from consensual sexual behavior was a conviction “for which under Arizona law a sentence of life imprisonment or death was possible,” *id.*, p. 4; 2) the Utah murder was “committed by strangulation” *id.*, p. 5⁷; and 3) Schad committed “the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.” *Id.* The judge rejected the State’s request to find Schad had “committed the offense in an especially heinous, cruel or depraved,” stating “the State has failed to prove the existence of this statutory aggravating circumstance.” *Id.*, p. 6.

As a consequence, two of the three aggravating circumstances the trial judge used to support a sentence of death were based on the Utah accidental death that occurred during a consensual act of autoerotic asphyxiation (“AEA”)—an act that, unfortunately, occurred then, and now, with regularity. *See e.g.*, Strangle With Care, Slate (June 5, 2009)(David Carradine found dead in Bangkok hotel; police discovered him in a closet with cords tied around his neck and genitals, suggesting that he asphyxiated while engaged in a sex game.).⁸ “Statistics on AEA are hard to come by, since deaths by asphyxiation are often reported as suicide. But the FBI estimates that it accounts for 500 to 1,000 deaths a year.” *Id.*, p. 2. AEA “is typically performed in the following way: A man—the vast majority of AEAers are male—loops a belt or rope around his neck, attaches the other end to a door knob or pipe, and lowers himself into controlled suspension. Sex

⁷The court took “judicial notice such a killing involves violence,” *id.*, and that the victim had been bound, but those or similar facts are typically found in AEA. *See, e.g.*, above.

⁸“The first recorded cause of autoerotic asphyxiation was Frantisek Kotzwara, a famous composer from Prague who died in 1791 while having sex with a prostitute. (She was tried for murder and acquitted.). Influential underground cartoonist Vaughn Bode asphyxiated to death in 1975, according to his son. Stephen Milligan, a member of British Parliament was found dead in his home in 1994, naked except for a garter belt and women’s stockings, strangled by an electrical cord.” *Id.*

or masturbation ensues. The pressure from the belt cuts off the flow of blood through the veins in his neck, causing blood to congest in the brain. Oxygen levels drop and carbon dioxide levels increase, producing lightheadedness, and, for some, intensifying erotic pleasure.” *Id.*

Here, the evidence showed that Schad was at some unknown time present in the home of a friend, Clare Mortenson, a homosexual man known to participate on a “rather regular basis” in autoerotic asphyxiation. ” R.T. 8-22-85, p. 31. *State v. Schad*, 470 P.2d 246 (Utah 1970). The medical examiner performed an autopsy on Mortenson and concluded his death “accidental.” R.T. 8-22-85, p. 31. The physical evidence supported the examiner’s conclusion. *Id.*, Exs. 4 & 5. But despite these facts, as noted above, Schad was tried and convicted of second-degree felony murder, and sodomy used to support underlying felony. *State v. Schad, supra*, 470 P.2d at 250; *see also State v. Schad*, 788 P.2d 1162, 1169 (1989)(death occurred during “mutual acts of sodomy... [A] practice known as auto-erotic asphyxiation.”).

During the sentencing phase of Petitioner’s capital trial in Arizona, the state introduced a certified copy of Petitioner’s Utah conviction for second degree murder as proof of two separate aggravating circumstances: §13-454(E)(1)(“the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable”); and §13-454 (E)(2)(prior felony conviction involving use or threat of violence on another.). *State v. Schad*, 633 P.2d 366, 382 (1981). The trial judge at Schad’s first sentencing hearing found both aggravating circumstances to exist, but no others aggravating circumstances. *Id.* In mitigation, the court found Schad “a model prisoner,” and that the “felony murder instruction” it issued

“may be considered as a mitigating circumstance.” *Id.*, at 383.

Petitioner’s conviction and sentence were reversed on appeal from state postconviction proceedings based on the trial court’s error in failing to define the felonies charged in its instructions to the jury. *State v. Schad*, 691 P.2d 711-712 (Ariz. 1984). Following remand, Schad was convicted of murder by a jury, and the trial judge again imposed a sentence of death. *State v. Schad*, 788 P.2d. 1162, 1164, 1168 (Ariz. 1989). During this time, Arizona law allowed the jury to enter a finding of first-degree murder based on a charge of either felony murder or premeditated murder—the jury was not required to choose a single theory. For that reason, it is not known what theory some, or all, of the jurors relied upon in issuing its verdict. Schad appealed to the U.S. Supreme Court to decide this issue, the Court accepted jurisdiction, and in answering the nonunanimous jury verdict, affirmed the Arizona Supreme Court’s decision, by a single vote. *Schad v. Arizona*, 501 U.S. 624 (1991).

At the second sentencing hearing, trial counsel presented the testimony of Stephen Love, the former chief agent for the Utah Department of Corrections and executive secretary of the Utah Board of Pardons. Love testified that in his career in corrections, it was unusual for him to have questions “as to both the conviction and the guilt” of the defendant, but he had those concerning Petitioner’s 1968 Utah conviction. R.T. 8-22-85, pp. 26-31. For that reason, Love ordered and read the Utah trial transcripts of that conviction. *Id.* Love copied direct quotes from the trial transcripts, including the following question by Petitioner’s counsel to the State’s medical examiner:

Q. Now doctor, based on your experience and your reading and the internal and external findings in this case here, do you have an opinion as to the possibility of the manner of death?

A. Yes, sir.

Q. And could you tell us what that opinion is.

A. I think that the most probable situation is that this is a combination of auto-erotic and sadomasochist situation immediately at or prior to the time of death and that death occurred as an accidental event in the course of this activity.

Id. at 29-30 (emphasis added). Nothing in the transcripts contradicted this testimony. *Id.* at 39. Based on this testimony and his review of the transcripts, Love recommended that Petitioner be released from prison. *Id.* at 31.

Trial counsel also presented the testimony of Dr. Otto Bendheim. Dr. Bendheim, a psychiatrist, reviewed the autopsy report of the alleged Utah victim, Mr. Love's report, and researched the area of autoerotic asphyxiation. *Id.* at 44. In his expert opinion, the death of the victim "occurred accidentally" as a result of an auto-erotic or sadomasochistic sexual act. *Id.* at 46; Exs. 3,4,5,6 and 7 to R.T. 8-22-85. The state presented no witnesses or evidence to rebut Dr. Bendheim's testimony and opinion.³ Despite this evidence, the trial court found both the (E)(1) and (E)(2) aggravating circumstances to exist, and that each aggravating circumstances was "a very substantial factor" in the court's decision to sentence Petitioner to death. R.T. 8-29-85 at 10. The Arizona Supreme Court affirmed Schad's death sentence. *State v. Schad*, 788 P.2d 1162, 1174 (1989).

Petitioner sought post-conviction relief in the Yavapai County Superior Court. Counsel for Schad in the United States Supreme Court, Denise Young, prepared

³Death as a result of autoerotic asphyxiation is widely recognized as accidental. See *Kennedy v. Washington Natl. Ins. Co.*, 401 N.W.2d 842 (Wisc. Ct. App. 1987)(death by autoerotic asphyxiation was accidental such that insured's surviving spouse was entitled to recover accidental death benefit.)

Petitioner's preliminary petition for post-conviction relief. The Preliminary Petition begins with a "preliminary note" advising the court that Ms. Young had conducted no investigation outside the record, had not reviewed the entire file and record, was unable to represent Schad, and requested appointment of counsel. The note explained:

This preliminary petition is being filed without proper review of the record, consultation with petitioner or necessary investigation because petitioner's execution is currently scheduled for December 27, 1991." A229. On page 3, paragraph 6, of the preliminary petition, Petitioner states, "Ms. Young has informed me that she is unable to represent me in state post-conviction proceedings. Therefore, I do not currently have a lawyer."

Ex. A.

The preliminary petition concluded with a prayer for relief requesting the court to a) conduct an evidentiary hearing; b) appoint counsel "and sufficient funds to secure expert testimony and evidence necessary to prove facts alleged in this petition"; and c) grant leave to amend the petition "after sufficient time to complete review of the record and investigation." *Id.*

A stay of execution was entered and counsel was appointed. From 1991-1994, Schad was represented by two different lawyers who requested a total of seventeen continuances, each of whom later filed a motion to withdraw for reasons unrelated to Schad's proceedings. The record is unclear what, if any work the lawyers undertook. In 1994, a third post-conviction lawyer, Rhonda Repp, was appointed. *Schad, supra*, 671 F.3d at 720-721. Repp requested the appointment of a mitigation expert, but the request was "lost in the system" for several months. Ex. B. Repp mistakenly believed her request to have been filed on March 27, 1995. *Id.* But on June 21, 1995, and after Repp filed a motion for an expedited ruling on her request, Repp learned that no action had been taken on her motion requesting appointment of a mitigation expert. *Id.*

Her request was eventually granted on July 6, 1995. Ex. C. Three months later, and only following the postconviction judge's statements indicating he would grant Repp no further continuances, Repp filed a supplement to the pending post-conviction petition. *Id.* Ex. D.

Repp's long-awaited supplement to her postconviction petition revealed little about her efforts, if any, to conduct the essential thorough investigation into Schad's background. Repp pleaded a general claim of newly discovered evidence, and, alternatively, argued sentencing counsel's ineffectiveness. Repp attempted to explain the meager work undertaken during her tenure as Schad's postconviction counsel:

The mitigation expert appointed by this Court recently discovered that Schad's presentence report was inadequate resulting in the Court not having available significant mitigating circumstances prior to imposing the death penalty.

The recent discovery that the Presentence Report had material omissions was the result of two visits by the court-appointed mitigation expert ...[with] the Defendant.

Ex. D. Repp's supplement attached two declarations from her mitigation expert, Ex. E, and requested the court provide her more time and funds to investigate, but it did not allege any additional facts. The Ninth Circuit opinion describes the expert's affidavit:

Attached to the supplemental petition was an affidavit from the expert in which she stated that the presentence report used at Schad's sentencing hearing did not adequately address the extent of the abuse Schad had suffered as a child. The affidavit described the physical and psychological abuse inflicted by Schad's father, including beating Schad with a belt or fists, refusing to allow Schad's mother to show him any affection, and isolating Schad from other children. The expert recommended that a comprehensive psychological evaluation be performed, and stated that she could compile a thorough profile only through further interviews with Schad and his relatives.

Schad, supra, 671 F.3d at 721.

The State opposed Repp's request for additional resources and time to complete the record on the ground that Petitioner had not established a causal link between the mitigation evidence he was pursuing and the crime. *See, supra*; Ex. F, State of Arizona's Supplemental Response, April 29, 1996, p. 3 (“[T]he burden is on Defendant to establish that [the mitigation] had a direct affect [sic] on his conduct at the time [of the crime.]”).

This Court then summarily denied the ineffective-sentencing-counsel claim, ruling:

In the Supplemental Petition, Claim 3(b), defendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation evidence then turns out to be favorable to the defendant, resentencing might be appropriate. Defendant is simply suggesting that it would be a good thing to delve further into defendant's prior convictions and to try once again to talk to family members, etc, etc. 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.

Ex. G.

Post-conviction counsel moved for rehearing, and filed another affidavit prepared by the mitigation expert, Ex. H, but the postconviction court denied the motion. Ex. I. The Arizona Supreme Court denied Schad's timely petition for review without comment.

Ex. J.

The postconviction court's action was unsurprising given Repp's utter failure to undertake the thorough investigation into Schad's background that his capital trial counsel had, too, failed to undertake. As a result of postconviction counsel's troubling and serious omissions and lack of diligence, Schad entered the federal district court proceedings with little evidence supporting his claim of ineffective assistance of trial counsel. And worse, at that time, the courts did not recognize a right to competent counsel.

in these important postconviction proceedings. Thus, Schad had no available means to assert, much less litigate, postconviction counsel's actions.

Schad initiated federal habeas proceedings, and the Federal Public Defender's office was appointed to represent him. After conducting the thorough investigation the law required, *see e.g., Wiggins v. Smith*, 539 U.S. 510, 521- 528 (2003)("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who committed criminal acts that are attributable to a disadvantaged background... may be less culpable than defendants who have no such excuse."), Schad filed an amended habeas petition alleging trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence. The district court later described the newly discovered evidence:

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 his mental health. The first declaration, from psychologist Charles Sanislow, provided an extremely detailed discussion of the psychological impact of Schad's abusive childhood. The second 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 provided details regarding Schad's father's severe alcoholism and the abuse he inflicted upon his family. The final declaration, from a paralegal employed by the office of the Federal Public Defender, described interviews with Schad's sister and aunt regarding Schad's childhood.

Schad, supra, 671 F.3d at 721-722.

The State, urged the district court ignore the evidence habeas counsel developed because Schad's postconviction counsel had not diligently presented it in state court, and as addressed above, it argued, too, that the evidence was not admissible under Arizona

law as mitigation because it did not establish a causal connection to the crime. *Schad v. Stewart*, CIV-97-2577, Docket Entry No. 86, pp. 64-65, Docket Entry No. 116, p. 8)(postconviction counsel “produced nothing but allegations”]. The district court agreed. *Schad v. Schriro*, 454 F. Supp.2d 897, 940, 943-944 (D. Ariz. 2006)(“Petitioner’s age and life experience attenuates any causal connection between Petitioner’s dysfunctional childhood and the 1978 murder).

Schad appealed to the Ninth Circuit Court of Appeals, arguing that state postconviction counsel’s efforts to discover evidence supporting a life sentence were sufficient to support counsel’s request for additional time, funds to investigate and a hearing to present evidence and prove her claim. At this time, longstanding, established law, Schad explained that he had not failed to develop the facts, and importantly, any alleged failure to develop was directly attributable to the State’s actions in urging the postconviction court deny Schad a hearing (and all relief) because he had not established the unconstitutional causal connection the State argued Schad needed to prove to prevail. In response, the State again argued that postconviction counsel failed to diligently discover, develop and present available mitigating evidence. *Schad v. Ryan, supra*, 671 F.3d at 722.

The panel disagreed that Schad had failed to develop his claim in the postconviction proceedings. It held the district court erred in finding otherwise when it focused on Schad’s lack of success in those proceedings, rather than his culpability in failing to develop the evidence. The panel explained that the evidence Schad later presented in the district court:

[W]e conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing

court's evaluation of the aggravating and mitigating factors present in the case. The evidence showed how Schad's childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad's childhood contained in Bendheim's testimony and the presentence report, it might well have been influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad's intelligence, good character, many stable friendships, and church involvement, at least while he was in prison. Although Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

Schad v. Ryan, 606 F.2d at 1044.

Noting, too, that the District Court made its alternative ruling on the merits of the claim, the Court of Appeals explained: "We disagree with that ruling."

Id. The panel remanded the proceedings for a hearing to determine post-conviction counsel's diligence.

Respondent moved for rehearing, arguing that postconviction counsel was clearly responsible for the inadequate record: "Schad failed to show even minimal diligence under *Williams v. Taylor*, 529 U.S. 420, 435 (U.S. 2000), because he did not file affidavits with the state court to support his claim of ineffective assistance at sentencing, when such information was readily available." Petition for Writ of Certiorari, No. 10-305, p. 17 (emphasis added). Respondent alleged, too, that it was post-conviction counsel's fault that an evidentiary hearing was denied: "What led to dismissal without an evidentiary hearing [in state post-conviction] was counsel's failure to file any affidavits supporting his claim, which cannot be explained by the routine obstacles that post-conviction counsel face in such proceedings." Petition for Writ of Certiorari, *supra*, p. 25

(emphasis added). Respondent noted, too: “the “extensive state court record demonstrating counsel’s lack of diligence,” and announced “[t]hat a more diligent effort could have yielded results is shown by the fact that habeas counsel obtained several declarations from the family, and the family spoke to habeas counsel’s investigator and experts. *Id.*, p. 18 (emphasis added). Respondent declared: “[] Schad could have filed affidavits, with the readily available evidence that would have provided a basis for requesting an evidentiary hearing in state court.” *Id.*, p. 19. Respondent cited Judge Callahan’s dissent: “Despite this wealth of time and resources, he failed to marshal any evidence regarding his own family background, and he further admitted in district court that the evidence was ‘*readily available*.’” *Id.* (emphasis in original).

But before those issues could be addressed, the Supreme Court announced its decision in *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011), holding “review under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Schad v. Ryan, supra*, at 722. On that ground alone—that Schad had not exhausted the facts supporting relief on his ineffective sentencing counsel claim in state court—it denied relief. *Id.* Schad presents these facts here, and requests this Court grant him a hearing and/or relief on the constitutional violations here.

As addressed above, postconviction counsel failed to conduct the diligent investigation needed to uncover the powerful facts supporting a sentence less than death. Had postconviction counsel undertaken the needed investigation, she would have discovered substantial evidence supporting a life sentence.

II. Claims for Relief

A. Schad Received Constitutionally Ineffective Assistance of Counsel at his Capital Sentencing. That Error was Aggravated When State Post-

Conviction Counsel Also Rendered Ineffective Assistance of Counsel
Denying Schad Any Review in State or Federal Court of His Clearly
Meritorious Claim Of Constitutional Error.

Although sentencing counsel sought to provide Petitioner a fair trial that supported a life sentence, he, failed to undertake the thorough, and long-required investigation needed and required. As noted above, counsel presented witnesses who testified about Petitioner's kindness and loyalty, a childhood raised by two impaired parents, the accidental death that resulted in his incarceration in a Utah prison, and his exemplary conduct throughout his Utah and Arizona incarcerations where he was a trustworthy, model prisoner, a reliable and good friend. R.T. 8-29-85, pp. 7-8. But the witnesses who testified about Schad's upbringing had no personal knowledge of Schad's family or life history. As a result, their testimony was based entirely on what Schad had told them. Though his statements were truthful, neither he nor they understood the importance and significance of providing to the Court a thorough or competent social history. That was counsel's job. But counsel's efforts failed completely in a key area: investigating and collecting substantial available evidence and identifying and obtaining appropriate mental health experts to explain the consequences and impairments that resulted from Petitioner's "miserable" childhood and background where he was raised by two severely mentally ill parents, and its resulting longstanding effects on him.

Had trial counsel competently conducted a comprehensive investigation, collected available records, interviewed family and other persons who knew him, and identified and retained qualified mental health experts armed with the relevant facts, there is a reasonable probability the result would have been different. ER 764-1341. With those

efforts, counsel could have presented powerful testimony supporting a life sentence. The facts supporting a life sentence included:

Expert testimony that Petitioner's father was a diagnosed schizophrenic, suffering from organic brain damage, post-traumatic stress disorder, alcoholism, and psychosis. He "was a violent and unpredictable parent, creating a chaotic and frightening home environment in which his illness took center stage." ER 1531. He "developed delusions of persecution," was destructive, threatening, hostile and abusive, and paranoid. *Id.* Petitioner's mother explains when her husband drank: he really lost his temper. I saw it in the evening when I returned from work and he had been drinking most of the day. Because I was gone all day working, I don't know what Edward did during the day when he was home with the children. I just didn't see a lot because I was working.

During our marriage, Edward used to hit me in the face and head. He accused me of seeing other men. I often went to work with visible injuries, like a fat lip and black eyes.

....

We had many bad fights, sometimes in front of the children, but one night in particular stands out in my memory. One of my girlfriends was over at the house and I had made a spaghetti dinner for Edward and the children. Edward was drunk and began accusing me again of seeing other men. He got furious and totally irrational, then kicked over the table filled with food and dishes. The food and dishes went everywhere. The kids and I were terrified.

Ex. K, Declaration of Mabel Schad Hughes. "At times, Edward went out of his mind."

Id. He threatened Schad's mother, Mabel, with a large butcher knife. Eventually, he was committed to the psychiatric ward at the VA hospital. *Id.*; Ex. L, Declaration of Charles Sanislow. He was delusional and incoherent. He believed, among other things, that Mabel worked for the President of the United States. To appease him, she dressed up on her visits to the psychiatric unit in the way she believed she would dress if working for the President. Ex. K, Ex. L.

The evidence also revealed that during Petitioner's childhood, Mabel turned to prescription drugs and work to escape the daily trauma she suffered. Over a nearly thirty-

year period, records reveal that Mabel sought medical attention for some ailment nearly monthly. She was repeatedly and regularly prescribed narcotics, including high dosages of Darvon, Percodan, Emagrin and Codeine, often in combination, for various injuries during this time. When she told her doctor she felt nervous or was experiencing family problems, she was prescribed Phenobarbital. See Ex. M, Medical and Work Records of Mabel Schad Hughes; Ex. L, Sanislow Declaration.

Had trial counsel thoroughly investigated, he would have learned that Mabel was unable to address some of her husband's multiple mental health disorders, including alcoholism. Mabel later informed habeas counsel and their experts that when her husband drank, he became violent:

I saw it in the evening when I returned from work and he had been drinking most of the day. Because I was gone all day working, I don't know what Edward did during the day when he was home with the children. I just didn't see a lot because I was working.

During our marriage, Edward used to hit me in the face and head. He accused me of seeing other men. I often went to work with visible injuries, like a fat lip and black eyes.

...

We had many bad fights, sometimes in front of the children, but one night in particular stands out in my memory. One of my girlfriends was over at the house and I had made a spaghetti dinner for Edward and the children. Edward was drunk and began accusing me again of seeing other men. He got furious and totally irrational, then kicked over the table filled with food and dishes. The food and dishes went everywhere. The kids and I were terrified.

Ex. K, Hughes Declaration. Had trial counsel diligently investigated Schad's background, he could have interviewed Schad's younger brother, Tom, who was also available to address some of the many consequences that resulted from this severely

dysfunctional family. Tom was a veteran of Viet Nam and an alcoholic. He began drinking at age 14, and was an alcoholic by 21. *See* Ex. N, Tom Schad VA Records; Ex. L, Sanislow Declaration. He suffered from chronic post-traumatic stress disorder, dysthymic disorder, and as a result, was depressed, fearful, and suffered feelings of homicidal ideation and loss of control. He felt betrayed and abandoned by his mother, and angry about life with his “distant, angry, reclusive” alcoholic father. He was often “ready to explode,” desperate and suicidal. *Id.*

Mabel knew little about what her psychotic and alcoholic husband did while she was away at work, but she did know that:

Edward was really hard on [Schad]. My husband never wanted me to show Ed any affection. I don't really know why it enraged him so, but I was afraid to hug Ed because I knew that Edward might hit me if I did.

Ex. M. The effects of Mabel's detachment and constant fear for her life, Ed Sr.'s severe mental illnesses and alcoholism that resulted in random, and unpredictable violence and delusional behavior had profound and enduring effects on Schad. Schad had no place of safety throughout his childhood and early teen years. He was alienated, unloved and uncared for by both parents. His mother could not show him affection for fear of physical harm from her husband. Also, given her own dysfunctional background, and regularly medicated state, it is unlikely Mabel was even capable of providing Schad the affection he, and any child, needs and requires for healthy development. Schad's attempts to protect his mother and his younger siblings from his father's explosive rage only left him beaten and battered. As a result, like his younger siblings did after him, Schad left home immediately after high school, joining the military. Ex. L, Sanislow Declaration.

As noted above, Schad's mother, too, "was burdened with significant psychological problems" that also rendered her unable to aid Schad. *Id.* She "suffered from a level of emotional and psychological detachment that is clinically significant and sufficiently extreme as to endanger her children physically" and "psychologically." *Id.*, p. 15. She was "profound[ly] detach[ed]" from her husband and family, and "so disengaged from her children that her behavior meets clinical criteria for neglect, its own category of severe child maltreatment." *Id.*, p. 21. Her "disengagement had dire consequences for her children." *Id.*, p. 18. As one stark result Mabel's inability to care for her children, one of Schad's sisters died when she was less than a month old. And, as addressed above, Schad's mother detachment from her children was so entrenched that she failed to recognize that her baby was dying. *Id.*

If Schad's trial counsel had conducted the thorough mitigation investigation the law required, the evidence supporting a life sentence also would have included qualified expert evidence about Schad's multiple impairments that he suffered throughout his life, including paranoia, anxiety and mania "complicated by his history of trauma." He suffers from "severe and chronic mental illness," a "type of bipolar affective illness," and "displays classic signs of chronic depression." When he is "not defending against depression with an energized, overly optimistic or manic state, hopelessness and helplessness are evident and appear to overwhelm him by disorganizing his thoughts and speech patterns." *Id.*

The records documenting the tortured childhood Schad endured at the hands of his severely mentally ill father and absent mother are astounding. Ex. L, Sanislow Declaration. The military, medical and psychiatric records from a great number and

variety of sources provide an extraordinary picture into his family, and corroborate the information Petitioner provided earlier to Dr. Bendheim and the presentence report writer. Exhibit O, Military Records of Edward Schad, Sr.; Exhibit P, Declaration of Dr. Leslie Leibowitz. But because counsel failed to conduct this investigation, the evidence he did present was rejected by the trial court as unpersuasive. Ex. L, Sanislow Declaration.

Counsel, of course, is obligated to conduct a full investigation into all the reasons supporting a life sentence. *See* American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, (“ABA Guidelines”); *Wiggins, supra*, 539 U.S. at 522 (“counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision...because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant’s background.”(internal citation omitted); *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009)(noting that the decisionmaker at “Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability.... It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have a particular salience for a jury evaluating Porter's behavior in his relationship with [the victim].”); see also *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010)(“We certainly have never held that counsel's efforts to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.”); *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003)(counsel “introduced some of [the defendant's] social history, [but] did so in a cursory manner that was not particularly

useful or compelling.”); *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir.

2002)(discussing counsel’s “affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant’s mental health); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999)(counsel has “a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request[.]”). As these decisions make clear, the law requiring counsel thoroughly investigate is longstanding.

In strikingly similar circumstances, the Supreme Court concluded that despite counsel’s investigation “to develop mitigating evidence from various sources,” counsel was ineffective when they failed to obtain readily available evidence about his background and mental state. *Rompilla v. Beard*, 125 S.Ct. 2456, 2468-69 (2005). For example, in *Rompilla*, defense counsel interviewed their client’s large family, and retained three mental health professionals to evaluate him. *Id.*, 125 S.Ct. at 2462-2463. But there, as here, counsel failed to discover readily available critical mitigation evidence, and provide that information to their mental health experts. *Id.*, at 2469. Had they done so, counsel would have discovered the evidence presented here: “undiscovered `mitigating evidence, taken as a whole, [that] ‘might well have influenced the [sentencer’s] appraisal’ of [Petitioner’s] culpability.’” *Id.*, quoting *Wiggins, supra*, 539 U.S. at 538; *Earp v. Ornoski*, 431 F.3d 1158, 1176 (9th Cir. 2005) (evidentiary hearing needed where petitioner alleged counsel ineffective for failing to present evidence that “of medical evaluations evincing organic brain damage which may have exacerbated” petitioner’s behavioral problems).

In a close case, as this one surely is, this corroborating evidence was essential,

and its absence prejudiced Petitioner. *Compare Williams, supra*, 529 at 368 (prejudice found despite defendant's conviction for murdering elderly gentleman and history of assaults, including "brutally assault[ing] an elderly woman"); *Stankewitz v. Woodford*, 698 F.3d 1163, 1165 (9th Cir. 2012) (following remand for hearing on sentencing counsel's ineffectiveness, district court, the state agreed to proceed without a hearing, and following review of "documents describing Stankewitz's troubled background, district court found state "failed to rebut most of Stankewitz's allegations, and granted his petition for a writ of habeas corpus. We affirm."). See also *Stankewitz v. Woodford*, 365 F.3d 706, 723 (9th Cir. 2004)(despite defendant's "violent and criminal behavior" including prior robbery, shootout, stabbing and attack on police officers, a "more complete presentation, including even a fraction of the details [petitioner] now alleges, could have made a difference."); ABA Guidelines 10.7 (duty to conduct thorough investigation into penalty phase), 0.11 (counsel's duties related to penalty phase) and Commentaries.

The resulting prejudice to Petitioner was great. First, mitigating evidence corroborating Petitioner's statements to Dr. Bendheim and others about his childhood was available, but due to trial counsel's failure to conduct a proper and thorough investigation was not presented. Second, because Dr. Bendheim's account of Petitioner's background was not corroborated, the value and weight of his testimony was undermined. Third, had the available information derived from a competent investigation been conducted, obtained and provided to Dr. Bendheim, he could have considered it in formulating his opinions about Petitioner's mental state and behaviors throughout his life, including at the time of the 1968 incident.

The Supreme Court long ago recognized that "[c]onsideration of [mitigating] evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'" *California v. Brown*, 479 U.S. 538, 554 (1987), quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact ... which a factfinder could reasonably deem to have mitigating value.'" *Tennard*, *supra*, 542 U.S. at 284 (internal citations omitted). "[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989). In determining where a defendant was prejudiced by counsel's errors and omissions in capital sentencing proceedings, courts consider the mitigating evidence available but not presented. "[T]o perform effectively ... counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" *Lambright v. Schriro*, 490 F.3d 1103, 1116 (9th Cir. 2007)(internal citation omitted). "Indeed... 'it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.'" *Id.* (internal citation omitted). This includes "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Id.*, at 1117. Also, "the investigation should include inquiries into social background and evidence of family abuse." *Id.* (internal citation omitted).

But as addressed above, unfortunately, at Schad's life-or death trial, he was the only source of information about his life—not because there were no other sources, but

solely because trial counsel failed to conduct the needed, and constitutionally required investigation. As a result, the trial court rejected the evidence presented through Dr. Bendheim and the presentence report as “unpersuasive.” If counsel had presented the multiple sources of evidence gathered here, detailing the neglect, physical and psychological abuse, isolation and secrecy in which Schad was raised and its effects on him, there is a reasonable probability of a different result. *Lambright v. Schriro*, 490 F.3d 1103, 1114, 1121 (9th Cir. 2007). Although far more evidence was presented here than in *Lambright*, counsel’s fatal error was, as in *Lambright*, the failure to substantiate the facts and evidence alleged with readily available witnesses, records and experts. *Id.*, at 1122-1123. *See Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006)(counsel ineffective for failing to provide records to strengthen mental health expert testimony); *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003)(counsel “introduced some of [the defendant’s] social history, but cursory manner not particularly useful or compelling.”); *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002)(counsel has “affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant’s mental health); *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999)(counsel has “professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request [.]”).

No tactical or strategic reason exists for trial counsel's failure to perform these tasks. Trial counsel understood the need to present testimony about Petitioner’s background, but he nonetheless failed to conduct the key investigation required to ensure the evidence would be given the consideration and effect necessary to support a life

sentence. *Rompilla*, 545 U.S. at 393 (prejudice found where “undiscovered mitigating evidence taken as a whole might well have influenced the jury’s appraisal of Rompilla’s culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome.”); *Wiggins*, *supra*, 539 U.S. at 536 (prejudice found where court found that “had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned a different sentence.”).

2. Postconviction Counsel’s Failure To Conduct A Thorough Investigation.

The first opportunity provided counsel to address trial counsel’s serious errors and omissions were in the state postconviction proceedings. Appointed postconviction counsel, however, utterly failed to conduct the needed, thorough and diligent investigation into Schad’s background that trial counsel had failed to conduct. Worse, Schad had no remedy for postconviction counsel’s abysmal performance. Longstanding law did not recognize a right to competent postconviction counsel. *See Coleman, supra; Pennsylvania v. Finley*, 481 U.S. 551 [] (1987)(Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.”)(internal citations omitted)). As a result, the State repeatedly denounced postconviction counsel’s lack of diligence, knowing postconviction counsel’s serious omissions could “not constitute ‘cause’” and Schad was at postconviction counsel’s mercy.

But as addressed above, that law has now been repudiated. Now under *Martinez, supra*, counsel can assert postconviction counsel’s lack of diligence to establish cause to overcome sentencing counsel’s ineffectiveness here. *Martinez, supra*, explained:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceedings, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id., at 1320. As *Martinez* made clear: the exception the Court announced was required:

[t]o protect prisoners with a potentially legitimate claim of ineffective-assistance of trial counsel.

Martinez, supra, at 1315. As shown above, postconviction counsel's multiple failings and inaction during these key proceedings clearly establish her ineffectiveness, and the resulting prejudice Schad suffered. Postconviction counsel failed to conduct even a minimally competent investigation, much less than the thorough investigation the law required. *See, e.g., Wiggins, supra; Williams, supra; Rompilla, supra; Porter, supra; and Sears, supra.* Based on the evidence presented here, Schad is entitled to relief on his trial counsel's ineffectiveness at Schad's capital sentencing trial. At a minimum, however, he is entitled to a hearing where he can present the evidence supporting a life sentence.

2. Prosecutorial Misconduct In Failing To Disclose Key Impeachment Evidence On The Credibility Of The State's Principal Witness, John Duncan, Who, Despite A "Lengthy Criminal History," The State's Attorney And Its Detective Had Promised To, And Did, Write Letters On Duncan's Behalf To California Authorities Requesting "Duncan's Sentence Be Reviewed And If Possible, His Sentence Be Modified In Light Of His Contribution To Criminal Justice" In Exchange For His Testimony, *Schad v. Ryan*, 671 F.3d 708, 714 (9th Cir. 2011). *See Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio V. United States*, 405 U.S. 763 (1972). Schad Was Prejudice At Guilt And Sentencing By This Constitutional Error. *See Cone v. Bell*, 556 U.S. 449 (2010).

A. Factual Background to the Claim

On August 1, 1978, 74 year-old Lorimer Grove left Bisbee, Arizona, in his Cadillac, pulling a camper trailer, to visit his sister in Washington. R.T. 6-19-85, p. 340; 6-20-85, pp. 376,565. Grove regularly carried large sums of cash. R.T. 6-26-85, p. 1236. That day, he was likely carrying over \$32,000 in cash. Little more is known before Grove's body was found eight days later below an embankment of a highway pullout near Prescott, Arizona. R.T. 6-19-85, pp. 286-288,340,358. A rope, knotted in the front, was tied around his neck; he died of ligature strangulation. R.T.6-19-85, pp. 361,367.

When Grove's body was found, a statewide manhunt was ongoing for the "Tison gang." See *Tison v. Arizona*, 481U.S.137, 139-142 (1987); R.T.6-20-85, p.409, 6-25-85,p.1035. The Tisons escaped from the Arizona State Prison on July 30, 1978, and on August 1, were believed to be in the area where Grove's body was found. R.T.6-25-85, pp. 900-901, 913-914, 998. Roadblocks and "police activity" were ongoing "throughout the state." R.T.6-25-85, p. 1035. The Tisons stole cars, transferred property from one car trunk to another, killed the vehicle's owners, and buried unneeded vehicles. *Tison v. Arizona, supra*; R.T. 6-25-85, pp. 902,913-914. The Tisons' involvement is the only explanation for the disappearance of the trailer attached to Grove's Cadillac that was never found despite an extensive, country-wide search, and the large sums of cash Grove carried. R.T. 6-25-85, p.974; 6-26-85, p.1288. Police suspected the Tisons killed Grove. R.T. 6-20-85,p.409.

The State's case against Schad was circumstantial. No evidence connected Schad to the location where Grove's body was found. R.T. 6-25-85, p. 1022. The evidence supports Schad's theft of Grove's car and credit cards, and forgery of Grove's credit cards, but nothing more. R.T. 6-27-85, p. 1381.

On August 3, 1978, thirty miles north of Flagstaff, and 150 miles from where Grove's body was later found, Flagstaff police found a Ford automobile Schad rented eight months earlier in Utah. R.T. 6-25-85, pp.882, 1032-1033. At Schad's second trial, **but not his first**, a Flagstaff policeman testified he found a mirror contraption inside the Ford. Grove's friend testified he saw something **similar** at Grove's home. R.T.6-19-85, p.343; 6-20-85, p. 495.

On September 8, Schad was arrested in Utah for driving a stolen automobile. R.T. 6-21-85, pp. 625, 626. He had Grove's car and credit cards that he first used on August 2nd, in Benson, Arizona. R.T. 6-15-85, pp. 923, 945; 6-21-85, pp. 627-628; 683-685.

John Duncan, a convicted felon on the run from his California convictions and pending criminal charges, including grand theft auto, and receiving stolen property, was the state's key witness at trial. R.T. 6-21-85, pp. 818, 829-831. Schad met Duncan the day before his arrest while visiting his girlfriend, Wilma. Duncan and wife, Sharon, lived with Wilma.

A month earlier, Duncan had been arrested in Utah on a California fugitive warrant. Utah Detective Ken Halterman arrested Duncan and arranged his release pending extradition. R.T. 6-21-85, pp.670-671. Duncan was awaiting extradition when he met Schad. R.T. 6-21-85, pp. 647, 822; R.T. 9-25-79,p.3. After meeting Schad, Duncan contacted Halterman and told him Schad was driving a stolen car. R.T. 6-21-85, p.819. Duncan and Halterman arranged to arrest Schad. *Id.*, p.839.

The day Halterman arrested Schad he asked Homicide Detective John Johnson to help him search the Cadillac because he believed a homicide occurred. R.T.9-25-79, pp.

20, 26-27. Halterman talked to Bisbee police and knew Grove was missing. *Id.*, pp.12-13; 6-21-85, p. 655. When Johnson and Halterman searched the Cadillac, they found credit card receipts, car registration, and clothing. R.T.6-21-85, pp. 635-37, 688.

Halterman asked Duncan to come to his office. R.T. 9-25-79, pp.12-13, 93-95. When Duncan and his wife, Sharon, arrived, Halterman asked Duncan “to visit” Schad in the jail. *Id.*, pp. 95-96; 6-21-85, pp. 850-851, 853; ER 104, 532, 1449-1455. It was not a normal visitation day; Halterman arranged “a special visit.” ER104, 145.; ER 241. Duncan agreed to “tell” Halterman “whatever” he “found out...” R.T.6-21-85, p. 803.

Although he later did not “recall that wording,” Halterman told Utah and Arizona police Duncan was his “confidential” informant who visited Schad at the jail. R.T.6-21-85, pp. 646; 648-649, 696-697, 794, 796-98; 6-25-85, pp. 887-88. Halterman gave Duncan his unlisted home phone number, kept him informed, and got him a reward. R.T.6-21-85, pp. 646-647, 650-651, 843. He told Duncan he would write his California judge, *id.*, pp. 651, 838, and “probably” did. He did not remember asking Johnson to talk to California prosecutors to help Duncan. R.T. 6-21-85, pp. 648, 651, 838-839.

Prosecutor Jaynes secretly aided Duncan, too. Jaynes telephoned Duncan’s judge, a Community Release Board, and wrote letters (including one the day before Duncan testified) to help his “extremely important witness...” ER 762-763; R.T.10-2-79, p.5.

Schad’s trial attorney did not know about the State’s aid when Duncan testified. Duncan claimed that Schad said he would deny being in Arizona, “particularly Tempe ...and Prescott...” R.T.6-21-85, p. 825. The prosecutor relied on this purported statement to tie Schad to Grove’s death, treating it as a confession to murder. R.T. 6-27-85, pp. 1353-54. He told the jury Schad had no other reason to tell Duncan “don’t let

anybody know about Arizona...,” Schad “disassociat[ing] himself with ... Arizona” was “significant,” as was his purported attempt to keep “himself away from the state of Arizona.” *Id.*

The State needed the jury to believe if Schad were innocent, he would have told Duncan he got Grove’s car and credit cards in Arizona. *Id.* Its murder case depended on the jury believing Duncan. The Arizona Supreme Court, too, relied on Halterman’s and Duncan’s testimony to affirm admission of the “most incriminating statement,” and reject Duncan’s informant status. *State v. Schad*, 788 P.2d 1162, 1165-66 (Ariz. 1989).

Evidence discovered for the first time in federal habeas proceedings, shows the state court’s reliance was erroneous: Halterman provided more assistance than admitted,, the prosecutor hid his valuable assistance, , Duncan was a long-known liar and “manipulative [] sneak” who will say anything. The Arizona courts and jury did not know that records contradicted Duncan’s status as an impartial witness. Duncan was a confidential informant who was provided undisclosed privileges and aid in his criminal charges and sentences in exchange for his testimony against Schad.

Nothing else linked Schad to Grove’s murder, but only theft and forgery. R.T. 6-26-85, p. 1306; 6-25-85, pp. 1012, 1022, 1061-1062; R.T.6-20-85, pp. 455, 482-483. In mid-September, 1978, identifiable fingerprints were recovered from the Ford, but they did not match Schad, or anyone else known to have touched the Ford. R.T. 6-20-85, pp. 422, 433-435, 519, 540-543; 6-26-85, pp. 1142-1146. Someone else used the Ford. R.T. 6-25-85, p. 905; 6-26-85, p. 1146.

Items inside the Ford, women’s clothing, a brand of cigarettes, wooden pipe, and marijuana-cigarette butts, did not belong to anyone known to have contact with it. R.T.

6-20-85, pp. 504-505, 509; R.T. 6-21-85, pp.21, 65. Women's pants, snagged and stained, possibly by heavy brush and body fluids where Grove's body was found, were untested. R.T. 6-19-85, pp.301, 330-334; 6-20-85, p. 407. The August 2, 1978 police inventory of the Ford was lost; nothing was photographed or fingerprinted. R.T. 6-20-85, pp. 459, 462, 472, 474, 476, 484-485. A second inventory six weeks later was useless: property had disappeared from the unsecured car. R.T. 6-25-85,p.1081; 6-20-85, pp. 442, 459-460, 474, 506.

During the second inventory, police "discovered" a three-pronged mirror contraption. Nothing proved it was inside the Ford on August 3, when the Ford had initially been seized. R.T. 6-20-85, p. 497. The contraption was never tested for prints, and nothing connected it to the Cadillac. *Id.*, pp. 442, 512, 534. Halterman and Johnson thoroughly searched the Cadillac the day Schad was arrested; no holes were detected. Hansen drove the Cadillac from Utah to Prescott before the first trial, and for six years after that trial. No holes were detected.

Hansen "discovered" the holes on his Cadillac at Schad's re-trial. R.T.6-25-85, pp. 872-873, 965, 1046. Despite repeated attempts, R.T. 6-25-85, pp. 1048-1049; 6-26-85, pp. 1290-1292; 6-27-85, p. 1381, the evidence showed only that with careful manipulation, two of the three-pronged contraption could be placed inside the holes. But any movement of the Cadillac caused the contraption to collapse.

In the end, nothing explained the impossible: how Schad killed Grove, drove the Cadillac, with attached trailer, and the Ford 150 miles north of where Grove's body lay, left no evidence in either car, or anything showing two cars were driven to the same spot, and disposed of the trailer in a way that ensured it could never be discovered. R.T. 6-25-

85, pp. 885, 1012, 1033; 6-26-85, p.1306. On this weak case where prosecution witnesses and prosecutors lied and concealed evidence, Schad was convicted.

The State prosecutors concealed favors provided Duncan. Exs. Q – S, letters and transcript. Duncan lied when he testified he received no aid. Duncan knew Halterman and prosecutor Jaynes helped him in his pending California cases. Both prosecutors at Schad’s trials knew Duncan was lying, said nothing, and watched Schad be convicted and sentenced to death.

At Schad’s second trial, Halterman admitted helping Duncan obtain a reward for Grove’s credit cards. R.T. 6-21-85, pp. 650-651, 843. He did not remember asking Johnson to contact California prosecutors to help Duncan, *id.*, pp. 648, 650-651,697, but testified he “probably” wrote a letter to Duncan’s judge. *Id.*, p. 651. That letter, and others he wrote expressing “admiration and gratitude” toward Duncan, remain undisclosed. Exs. Q and R.

Prosecutor Jaynes wrote at least two letters requesting leniency for Duncan, including one to Duncan’s judge. *Id.* The October 1, 1979 letter was written the day before Duncan testified at Schad’s first trial. R.T. 10-2-79, p. 5. Jaynes described Duncan as “an extremely important witness for the State,” who “has been very cooperative,” and “deserves ... consideration,” for “an early release” from prison. ER762. Jaynes requested California authorities “giv[e] this matter your immediate attention...” *Id.*

During Schad’s trial that began the next day, Jaynes did not tell defense counsel or the jury about the letter he wrote to help Duncan. He sat silent during defense counsel’s cross-examination of Duncan as counsel struggled to get Duncan to admit he

wanted the State's help with his pending criminal charges. R.T. 10-2-79, pp. 77-78. On redirect, Jaynes asked:

Q. [A]re you serving out the entire term according to the prison rules?

A. Yes, sir.

Q. Have I made you any promises of lenient treatment if you testify?

A. Absolutely not.

Q. *Do you have any reason to believe you will get any lenient treatment?*

A. No, sir.

Id., p.125 (emphasis added). Four days after writing his letter seeking Duncan's early release, Jaynes told the jury:

John Duncan is a man who is believable on questioning ... [W]hen he came in to testify in front of you in Court, he was serving time over in ... California ... the Court will instruct you to consider it... as to whether or not that person is likely telling the truth in spite of the fact he may have a criminal record.... what has John Duncan to gain by telling you what he told you?

He has got a sentence that he has no hope whatsoever, no promises of anything of getting any good out of it, and ...he is going to suffer a little bit... He is going to be known as a snitch....

So ... not only is he not going to gain something, he is going to lose something by testifying in this case....[H]e voluntarily went over to California, turned himself in and started serving ...the entire time that's assigned....

R.T. 10-2-79, pp. 64-66 (emphasis added). Schad's attorney suspected Duncan was receiving benefits from the State, but was unable to prove his suspicions because Jaynes hid the evidence.

At Schad's re-trial, prosecutor Frank Dawley never disclosed the assistance Halterman and Jaynes provided Duncan. He, too, relied on Duncan's testimony to convict Schad: "[R]emember [Schad] telling...Duncan "don't let anybody know about

Arizona.” R.T.6-27-85, p. 1354. Duncan again testified he asked Halterman to help him, but did not “know if he did.” R.T. 6-21-85, p. 838. That was untrue. At Duncan’s March 16, 1979 hearing, Duncan’s California counsel reminded the judge about Halterman’s support and aid to Duncan discussed at the November, 1978 hearing. Ex. S.

Suppression of evidence favorable to an accused “violates due process where the evidence is material, either to guilt or punishment.” *Brady*, 373 U.S. at 87. The State cannot withhold, as it did here, material evidence to get a conviction. Schad was convicted on the testimony of a known liar who fabricates stories to help himself.

Exculpatory evidence the State must disclose includes evidence “tend[ing] to exculpate [the accused] or reduce the penalty,” including evidence or information undermining the credibility of prosecution witnesses. *Id.* When evidence is withheld, a defendant is entitled to relief if the evidence was favorable to him, it was suppressed (whether intentionally or not), and prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Evidence must be disclosed “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result ... would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

Schad meets that test. “The likely damage [of a Brady violation] is best understood by taking the word of the prosecutor...” *Kyles v. Whitley*, 514 U.S. at, 444. The prosecutor told California authorities, including Duncan’s judge, Duncan was an “extremely important witness” “of material assistance.” (emphasis added). Exs. Q,R, The prosecutor relied on Duncan to prove Schad’s guilt: he treated Schad’s alleged statement to Duncan as a confession. He told the jury it was “significant” Schad “lied and dissociated himself with” “Arizona”: “remember him telling... Duncan” “don’t let

anybody know about Arizona.” R.T. 6-27-85, pp.1353-1354. The jury did not know Duncan received benefits in exchange for that testimony.

The prosecutor also presented false and misleading testimony about its hidden assistance. When false testimony is presented, a new trial is required when “the false testimony could...in any reasonable likelihood have affected the judgment of the jury....” *Giglio*, 405 U.S. at 153-54 (quoting *Napue*, 360 U.S., at 269,271). See also *United States v. Agurs*, 427 U.S. 27 (1976).

If the State had disclosed the facts it was obligated to disclose, Schad could have impeached Duncan’s testimony by showing Duncan was willing to say and do anything to get the help he needed on his pending California convictions, including lie about the assistance he received under oath. If the truth had been known about Duncan, it is reasonably probable that the result would have been different. “The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.” *Napue*, 360 U.S. at 269; *Carriger v. Stewart*, 132 F.3d 463, 480-482 (9th Cir. 1997)(state witness’s undisclosed history of lying to police and blaming his crimes on others undermined confidence in the verdict). “[T]he importance of allowing a full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case” “cannot [b]e overemphasize[d].” *Silva v. Brown*, 416 F.3d 980, 986 (2005). “[O]ne can hardly be confident that [the defendant] received a fair trial given the jury’s ignorance of [Duncan’s] true role” in this case. *Banks v. Dretke*, 540 U.S. 668, 702 (2004).

Counsel's access to the prosecution letters would have lead to facts proving Halterman's assistance, and Jaynes' assistance, and established Duncan's reputation as a liar and manipulator. These facts demonstrate a reasonable probability the undisclosed evidence would have undermined the credibility of this key prosecution witness, and entitles Schad to relief from his unconstitutional conviction. *Kyles*, 514 U.S. at 433.

3. In Violation Of The Eighth And Fourteenth Amendments of the United States Constitution, the Sentencing Judge Applied Arizona's Unconstitutional Causal Nexus Requirement Which Held That The Mitigation Evidence Not Causally Related To The Crime Was Not Relevant To The Sentencing Calculus. This Now Repudiated Requirement Resulted In The Sentencing Judge's Failure To Credit, If Not Outright Rejection Of, Schad's Mitigating Evidence Supporting A Life Sentence. *Tennard v. Dretke*, 542 U.S. 274, 284-287 (2004)

Arizona law long required that a capital sentencer may not give effect to proffered mitigating evidence unless the defendant can establish a "causal nexus" between the mitigation and the crime. *State v. Djerf*, 959 P.2d 1274, 1289 (Ariz. 1988)("Arizona law states that a difficult family background is not relevant unless the defendant can establish that his family experience is linked to his criminal behavior."); *State v. Newell*, 132 P. 2d 1274 (Ariz. 2006)("lack of a 'nexus' between the mitigating factors and the crime 'may be considered in assessing the quality and strength of the mitigation evidence.'").

In 2004, the Supreme Court of the United States decided *Tennard v. Dretke*, 542 U.S. 274 (2004), which struck down the identical nexus requirement used by the Fifth Circuit. The High Court held that a scheme requiring mitigating evidence to have a nexus or causal connection to the capital crime before it can be given full consideration and effect had "no foundation in the decisions of this Court." *Id.* at 289.

The Ninth Circuit Court of Appeals held the nexus/causal connection requirement erroneous in another Arizona capital case. *Lambright v. Schriro*, 490 F. 3d 1103 (9th Cir.

2007). In *Lambright*, the Court detailed the problems inherent to the nexus/causal connection requirement the Fifth Circuit and the Arizona courts (both state and federal) used:

If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than a death at the hands of the state, is the appropriate punishment for the particular defendant. This is simply unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Lambright, 490 F.3d at 1115.

These decisions are based on clearly established law that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586,604 (1978)(emphasis in original); see *Eddings v. Oklahoma*, 455 U.S. 104,110 (1982)(same); *Skipper v. South Carolina*, 476 U.S. 1,4 (1986)(same). Even where particular mitigating evidence does "not relate specifically to...[the defendant's] culpability for the crime he committed," the defendant is constitutionally entitled to offer such evidence because it might "serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S., pp.4-5 (quoting *Lockett*, 438 U.S., p.604). In particular, the Supreme Court has confirmed a defendant's history of childhood abuse

can have an especially “powerful” effect on the jury’s sentencing deliberations. *See Wiggins v. Smith*, 539 U.S. at 533-537.

A corollary to the *Lockett* rule is that a sentencer in a capital case may not refuse to consider or give effect to any relevant mitigation evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 398-399(1987); *Eddings v. Oklahoma*, 455 U.S.104, 112-116 (1982); *Smith v. McCormick*, 915 F.2d 1153, 1167 (9th Cir.1990). “The sentencer . . . may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration.” *Eddings*, 455 U.S.,115-116. When it is not clear whether the sentencer actually considered all the mitigation evidence, the appellate court may not speculate about the sentencer's thinking, but instead must remand the case to resolve any ambiguity. *Id.* at 119(O'Connor, J., concurring). *See also, Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock*, 481 U.S. 393 (1987). A "mitigating circumstance" is any factor relevant in determining whether to impose a sentence less than death.

1. Evidence in Mitigation Presented at Sentencing

At the time of Schad’s sentencing, the Arizona courts required a capital defendant prove a causal nexus between the mitigation offered and the offense before the sentencing judge could weigh or fully consider the evidence. *See State v. Stanley*, 809 P.2d 944 (1991). Arizona law precluded full and proper consideration of most of the relevant mitigation in the record. *Tennard*, 542 U.S. 274.

The evidence presented at Schad’s capital sentencing hearing included fourteen witnesses who testified for Schad. As discussed above, Love, former chief agent for Utah prisons, and member of its pardons board, testified about Schad’s Utah conviction,

and recommended a life sentence. Psychiatrist Bendheim who reviewed the autopsy report of the Utah decedent, Love's report, and researched autoerotic asphyxiation, testified that death was accidental resulting from consensual sexual activity. *Id.*, pp. 44.46; Exs. 6, 7; R.T. 8-22-85. The state medical examiner who performed the Utah decedent's autopsy agreed. R.T. 8-22-85, p. 30. The physical evidence in the Utah case supported this conclusion. Exs. 4,5, R.T. 8-22-85. This testimony was uncontested at sentencing.

Bendheim also testified that based upon his evaluation, Schad had a "miserable" childhood, was deprived and unloved. R.T. 8-22-85, pp. 48,51. His father, an abusive alcoholic who had numerous alcohol-related arrests and convictions, drank heavily and did nothing for weeks at a time, and beat Ed regularly. Ex.8, R.T. 8-22-85.

Ed, as the oldest, tried to protect his mother and younger siblings by taking the beatings meant for them. YCSUPCT DOC No. 223, p. 4. He learned to suppress his emotions and feelings. He was emotionally abused, too, his father told him he was not his son. Once when Schad was forced to call the VA hospital to have his violent father committed, Ed's mother changed her mind when VA personnel arrived. Ed then received the worst beating of his life. *Id.*, pp. 4-5. He could not socialize with others, unsurprisingly was shy and withdrawn. *Id.*

Ed ran away from his abuse, and started stealing cars. As Bendheim explained, Ed's crimes were not violent or of a dangerous nature. "He stole cars, he forged checks, he did all that, but he never attacked anybody." R.T. 8-22-85, p. 48. Based on his extensive experience, Bendheim testified that Schad was not dangerous. *Id.*, p. 49. The Utah prison authorities agreed. While incarcerated there, Ed had "access to shotguns and

weapons, but the institution feels very comfortable with Ed there.” R.T. 8-22-85, pp.58-59; R.T. 8-22-85, p.60.

Bendheim also testified Schad is an exemplary prisoner. *Id.*, pp.49, 51. He has tried honestly to rehabilitate himself. *Id.*, p. 50. He has been gainfully employed, obtained an education and made beautiful gifts for others. *Id.*

His prior incarceration in the Utah prison was also exemplary. Witness Love knew Schad when he was incarcerated at the county jail, and later at the prison. *Id.*, p. 33. Schad was a “tier man” and trustee in the jail, and had a “substantial amount of latitude.” *Id.*, p. 33.

Schad functions well within prison and is a “model prisoner.” R.T. 8-22-85, pp. 60, 64, Ex. 8 R.T. 8-22-85, pp. 58-59. He “never causes any trouble,” “gets along well,” “always happy,” “very good” attitude, his “demeanor and attitude reflect the highest cooperation,” “work record is flawless” “he has proved to be dependable and trustworthy even in the light of pressure to do otherwise,” maintains “good institutional record in his work and disciplinary,” acts in “very positive manner,” “his attitude is tops,” “[h]e is the type of fellow that I feel could be trusted in any situation,” “[h]e is a gentleman at all times,” “I truly appreciate this man and my association with him.” Ex. 8 to R.T. 8-22-85, pp. 58-59.

The descriptions Utah authorities provide about Schad’s work performance and ethic are equally laudatory. He has “exceptional work records,” and performs the “best” and “fine” “jobs.” He is a “very good worker and ...stays busy at all times doing his job”; “neat and patien[t],” “does a very professional job,” “worked long hours and [] under a lot of pressure from inmates,” “fastidious, diligent, takes great pride in the finished

product and is outstanding in keeping his verbal orders and commitments to those he is working for and with,” “does extra work that he sees without being told to do it,” “is careful with supplies and does not waste [them]..., is good to communicate with me on problems and he asks for advice when he feels it is needed.” His superiors “thank[ed] Ed for the fine job he did for us under very rough conditions,” “express appreciation & gratitude to [him] for the work ... performed ...ever missed a days work [,] ...never come up with ...excuses of why the work shouldnt [sic] be done [,] ...always ...on the ball to get the job going and to make good suggestions towards improving different area’s [sic][,].” “Many times ... he worked more than five days a week and has worked 15-17 hours steady ...to have a paint job completed for the next days operation...” “I appreciate this man and the work load that he takes care of.” *Id.*

While incarcerated in Utah, he “was productively involved in college programs, things that would personally better his education and himself.” R.T. 8-22-85, p. 65. He took college courses from LaSalle where he earned “straight A’s except for one class in which he received a B,” and “completed all the college courses he can.” Ex. 8 to R.T. 8-22-85, pp. 58-59.

John Powers, former Utah prison social worker, and management auditor for the prison, first met Ed when he began working at the prison. *Id.*, pp. 56-58. Ed was a model prisoner. *Id.*, p. 60. But shortly before his release from the Utah prison, Powers noticed a marked change in Ed. This change was due to Ed’s relationship with Wilma Ehrhardt, who, given her “psychological make-up was about the worse person that [Ed] could become involved with.” *Id.*, p. 63. When the relationship ended between Ed and

Ehrhardt, Ed “was relieved,” but then Ehrhardt “made contact with Ed and things were patched up and they resumed their relationship.” *Id.*, p. 64.

Once Ed was released from prison, he “had a hard time finding any type of occupation,” and “ended up working in a rest home.” The “cultural shock from living in the prison” and going back to the community with this “very unstable” person gave Schad “more additional problems” and was “overbearing.” *Id.* After he left prison, Ed contacted Powers in late 1977. Ed was despondent. He asked to see Powers for counseling. Powers explained he could not help him because Ed was not incarcerated. *Id.*, pp. 77-78.

Since his arrest for this crime, and his incarceration on Arizona’s death row, Schad’s model behavior continued. Yavapai County jail deputy McKeand met Ed when he was incarcerated in 1979, and again in 1985. *Id.*, p. 99. Ed never posed any disciplinary problems, got along well with other inmates and guards, and helped keep other inmates “in line” to avoid problems. *Id.*, pp.100-101.

Arizona Department of Corrections Officer Danny Martinez first met Ed when he moved him from Cellblock Six to Cellblock Four. The inmates chosen for that move were “the cream of the crop;” not security risks or “duty hazards.” *Id.*, pp. 124-25. After the move, Martinez had almost daily contact with Ed. Ed is well-behaved, not a security problem, and never involved in disciplinary proceedings, or violent situations. Ed showed respect for authority. Martinez and Ed get along well, and Ed gets along well with other inmates. His prison adjustment is excellent. *Id.*, pp. 126-128.

Security Chief Frank Terry of cellblock four, a maximum custody unit at the Arizona prison that housed condemned inmates, met Schad during his incarceration. Ed

was chosen as one of 21 inmates to be moved to the less restricted unit at Cellblock Four. Terry testified Ed had no disciplinary problems of any kind, and was not involved in any violent or threatening behavior during his stay. *Id.*, pp. 94-95. Ed gets along well with other inmates and guards. *Id.*, p. 95.

Jimmy Stamps, a Cellblock Four counselor, met Schad during his incarceration in Cellblock Six and was his counselor once he moved there. Ed is not a security problem and is a good prisoner. He has no disciplinary write-ups and or problems with other prisoners or guards. *Id.*, pp. 129-131.

Witnesses also testified about their ongoing friendship with Ed during his incarceration on death row. Pastor Ronald Koplitz, senior chaplain for the county jail, and former chaplain for the Arizona prison, met Ed in 1981 when he was in the death house. *Id.*, pp.102-103. Koplitz and Ed visited, and became friends. Ed was very likeable, and someone who stood out in comparison to other inmates. He is not a typical inmate and doesn't play games. *Id.*, pp.103-105. Following a number of theological discussions, Ed asked Koplitz about joining his church. Koplitz did not encourage Ed, but after talking to other church members, including the senior pastor, and further conversations with Ed, he began formally instructing him, concluding that Ed's desire was sincere and his faith genuine. *Id.*, pp.106-107,115-116. Eventually, Ed became a church member. By talking to other inmates, Koplitz knew Ed helped other inmates in calming down. *Id.*, p.109.

Pastor George Larson met Schad in early 1984. Ed exhibits great interest in other people and outside prison events, and in his parish. He pursues educational opportunities,

seeks to improve himself, and keeps in contact with people, all signs of mental and spiritual growth. *Id.*, p. 136.

Church organist Janet Bramwell testified she first met Ed through her church in 1982. She began writing and then visiting him. *Id.*, pp. 81-83. Ed is warm, likeable and a talented artist. He made greeting cards and painted watercolors for Bramwell and her family. He has taken college courses and was nominated to the national dean's list. He has much to offer the prison and society, *Id.*, pp. 84-89, is a close friend; she and her family love him. *Id.*, pp. 86,88. Her husband, Frank, a computer programmer, testified, and also regularly writes and visits Ed. He, too, testified about the gifts Ed made for him and his children, Ed's positive contributions to other inmates, and identified exhibits showing the educational and religious courses he has taken. R.T.8-22-85, pp.137-143. Ed is considered a family member and offered good insight into their problems and concerns. *Id.*, p. 143.

Herb Zerbst, a retired machinist, met Ed through his church, R.T. 8-22-85, pp. 118-119, and corresponded with him, and visited Ed. Ed is a caring person and very sympathetic to he and his wife's problems. When Zerbst lost his job, Ed gave him great comfort, like a "close relative." *Id.*, pp.120-121. Ed is creative, sensitive and caring. *Id.*, pp. 122-123. Zerbst's wife, Nancy, also testified about meeting Ed three years ago and Ed's participation in their family events. *Id.*, pp.146-147. She regularly visits Ed. Ed is patriotic and an inspiration to Nancy whenever she or her family have problems. He is considered a family member and included in their annual Christmas letter. He is very loving to her children, and a worthy person. *Id.*, pp. 150-153. See also Exs.11-19,24, R.T. 8-22-85, pp.141-142,154-155.

Dick Ortiz, then chairman of the Arizona Board of Pardons and Parole, also testified. He learned about Ed's case from a reprieve/commutation hearing in July, 1983. *Id.*, pp.70-71. Ortiz had contacted the Yavapai County attorney who told him Ed had been offered a life plea. *Id.*, p.71; Exs. 9,10, R.T. 8-22-85, p. 73. Ortiz was upset Ed had been sentenced to death, after a plea offer to a life sentence. R.T.8-22-85, p.75.

2. The Trial Court's Errors.

Despite this evidence supporting life, the judge sentenced Schad to death. It found three aggravating factors; as discussed below, two of the aggravators are based on the same unconstitutional Utah 1968 conviction. The third, pecuniary gain, was based on an aggravating circumstance rejected at the first sentencing hearing.

The judge found no statutory mitigating circumstances. The judge found the evidence presented established: 1) Schad was "a model prisoner in Utah prior to 1977;" 2) He "has been a model prisoner in the Arizona state prison and the Yavapai County jail for over five years;" 3) He "has proven to be a good worker and has taken up painting, crocheting, and an active correspondence;" 4) He "has been accepted into a Lutheran Church;" 5) "He is helpful, charitable and appears to care for people;" 6) "He has no drug or alcohol problems and is not a disciplinary problem in prison;" 7) "He has taken many college courses and earned superior grades;" and 8) "He helps prison officials." He found, Schad "a personable, helpful prisoner who causes no problems. A model prisoner. These are mitigating circumstances. See Special Verdict. The judge also found that Schad "shows signs of rehabilitation and of possessing a good stable character." *Id.* "This is a mitigating circumstance." *Id.* The judge then failed to give effect to any of this evidence, stating it is was "not particularly weighty in view of defendant's length of

incarceration.” *Id.* The judge did not attempt to explain that nonsensical statement, or how a defendant’s length of incarceration since his first trial and sentencing could rebut evidence of rehabilitation and a good stable character found during that incarceration. The only way to understand the judge’s statement is by examining Arizona law. See *State v. Newell*, 132 P. 2d 1274 (Ariz. 2006), “lack of a ‘nexus’ between the mitigating factors and the crime ‘may be considered in assessing the quality and strength of the mitigation evidence.’”. Arizona law constrained the judge from giving effect to relevant mitigating evidence. Further, by finding and then rejecting this important mitigation, see *Skipper v. South Carolina*, 476 U.S. 1 (1986), the judge turned positive mitigation evidence into aggravation contrary to the facts and law. *Zant v. Stephens*, 462 U.S. 862, 885 (1983)(prosecutor may not argue mitigation evidence as aggravation).

The court also found the felony murder instruction given the jury was a factor supporting a life sentence, but inexplicably rejected this mitigation it had just found, stating “no[] evidence [] indicate[d] that this murder was merely incidental to a robbery. The nature of the killing belies that.” Special Verdict. The court did not explain how it arrived at this conclusion when no evidence supported it, and when the state had relied on robbery to obtain its verdict, see R.T. 6-27-85, pp. 1347-48.

The trial court also failed to give effect to uncontroverted evidence of Schad’s “unfortunate childhood” because it was not a “persuasive mitigating circumstance.” The court’s ruling again is explained only by the deeply rooted Arizona nexus/causal connection requirement *Tennard* rejected. This evidence is important mitigation “of a difficult family history ... typically introduced by defendants in mitigation,” *Eddings v. Oklahoma*, 455 U.S. at 115, because it bears on Schad's character, and is based on "the

belief, long held by this society, that defendants who commit criminal acts...attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The trial court rejected, again without explanation, the state's life plea offer, stating its sentencing decision was not constrained by that offer. Even so, the fact that the prosecution was willing to offer Schad a parolable life sentence is mitigating evidence that should be considered and given effect in determining the appropriate sentence because it shows the state did not believe a death sentence warranted here. *See, e.g., State v. Lee*, 185 Ariz. 549, 553, 917 P.2d 692,696 (1996)(co-defendant's life sentence pursuant to plea agreement offered but rejected constitutes mitigation).

The judge summarily found each aggravating circumstances "a very substantial factor in this court's sentencing decision" and that the remaining mitigation did not overcome any one factor. *Id.* at 10. That finding is clearly unreasonable. The prior conviction aggravators are based a consensual act in which death accidentally resulted, and the pecuniary gain aggravation has no record support. Again, the only way to sensibly understand the Court's finding is to look to Arizona's nexus/causal connection requirement. To do so establishes the trial court's error.

3. The Arizona Supreme Court's Constitutional Errors.

On appeal, the Arizona Supreme Court affirmed Schad's death sentence. *State v. Schad*, 788 P.2d at 1182. It rejected Schad's claim that the judge "did not find and consider the defendant's potential for rehabilitation," stating he did, but found it

“insufficient to overcome any of the aggravating factors.” *Id.* The appellate court never said whether it either agreed, or disagreed with the judge’s finding.

It rejected as “a mitigating circumstance” “the victim” in the 1968 Utah conviction “experienced a ‘pleasurable erotic experience before he died,’” stating it agreed the circumstances of this conviction were not mitigating. *Id.* That decision, clearly rooted in the Arizona caselaw requiring mitigating evidence establish a nexus or causal connection to the crime, is, too, unreasonable under clearly established federal law. *See, Tennard, supra.* Moreover, the Arizona Supreme Court’s decision is based on an unreasonable application of the facts because it clearly mischaracterized (or misunderstood) the asserted claim. Schad’s counsel did not argue the victim’s pleasure experience was a mitigating circumstance. He argued the victim actively participated in the event that ended tragically, but accidentally. Appellant’s opening brief to the state supreme court, stated: “All the evidence points to the fact that the victim in that case participated in what the victim perceived to be a pleasurable erotic experience which simply happened to result in his accidental death.” App.Opn.Brf, p.43. While Schad’s counsel could have used different language to make his point, the argument was presented more clearly in the reply:

The reason the circumstances surrounding the Utah murder should be treated as a mitigating circumstance is because all of the circumstances of that murder indicate that it was an accident and that the sole reason for conviction on the murder charge was the fact that the defendant and the victim were engaged in homosexual acts and that the death resulted because of the manner in which those acts were committed.

App.Rpl.Brf.,p.16.

But despite the uncontested and uncontradicted facts that the victim in Utah case participated in the conduct that led to his uncontested and uncontradicted accidental

death, and was known to have participated in those acts previously, The appellate court refused to consider and give effect to this evidence mitigating the weight of two out of three aggravating circumstances. This clearly violates Lockett and its progeny.

After affirming the two aggravating circumstances, the court concluded that Schad's "exemplary behavior while incarcerated is not "sufficiently substantial to call for leniency." Thus, despite the multiple mitigating factors the trial court found, the Arizona Supreme Court failed to consider and give effect to them in their review. In addition, the appellate court failed to consider the mitigating evidence the state court wrongly rejected: defendant's stable character and rehabilitation prospects, his abusive background, the circumstances of the prior conviction and the state's offer of a life sentence.

To avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," the sentencer must consider, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense ...the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)(opinion of Burger, C.J.)(emphasis in original). *See also, Penry v. Lynaugh*, 492 U.S. at 319; *Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987).

We are not permitted to presume that because evidence was admitted before the factfinder, it was necessarily given consideration. 'Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.'

Smith v. McCormick, 914 F.2d 1153,1166 (9th Cir. 1990)(internal citation omitted). The sentencer may determine the weight to be given the mitigation evidence, but it "may not give it no weight by excluding such evidence from . . .consideration." *Eddings v. Oklahoma*, 455 U.S. at 113. *See also, Parker v. Dugger*, 498 U.S.308,323 (1991).

The court did just this. The trial court had undisputed mitigating evidence before about Schad, including an unstable, isolated childhood, dysfunctional family including an aggressive, alcoholic father who beat him and emotionally abused him, a mother and siblings who he tried to protect from his father and took beatings meant for them, an unblemished record of being a good worker, had studied for and been accepted into the Lutheran Church, is helpful, charitable and cares for others, has taken many college courses and earned superior grades, is personable, has no drug or alcohol problems, was offered a plea to a life sentence, and his prior conviction on which his death sentence rests is unconstitutional and based on uncontested evidence that the decedent's death was accidental. Of this evidence, as discussed above, the trial court wrongly rejected Schad's "unfortunate childhood," his potential for rehabilitation, the 1968 conviction circumstances and the prosecutor's life sentence offer. As to the rest, it said it considered it all, and found most persuasive, Schad being "a model prisoner, a student, and religious man with many supportive friends since being incarcerated." R.T. 8-29-85, p. 9. But even so, Arizona's nexus requirement constrained the Arizona courts from giving this evidence effect. *See State v. Newell, supra.*

The state appellate court's independent review did not cure the trial court's error in rejecting this mitigation evidence. It instead compounded it. The only evidence the appellate considered mitigation and weighed against the aggravating factors was Schad's "exemplary behavior" in prison. It never mentioned the other mitigating evidence the trial court had found, including those the trial court found "most persuasive." It never mentioned the mitigating factors the trial court had wrongly rejected, other than to note the trial court had considered Schad's potential for rehabilitation. 788 P.2d at 1172.

This error by the Arizona Supreme Court alone is constitutional error. “[M]eaningful appellate review” plays a “crucial role” “in ensuring that the death penalty is not imposed arbitrarily or irrationally. *Parker v. Dugger*, 498 U.S. at 320: “It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant’s actual record. What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.” *Id.*, 498 U.S. at 321 (internal citation omitted). That meaningful review did not happen here.

“This is not simply an error in assessing the mitigating evidence.” *Parker v. Dugger*, 498 U.S. at 322. The Arizona Supreme Court apparently believed the only mitigating circumstances the trial court found was good prison behavior. The court failed to consider the facts the trial court found proven in its independent review of Schad’s death sentence, and failed to consider the mitigating evidence the trial court wrongfully excluded.

By depriving Schad of the individualized treatment required under the Fifth, Sixth, Eighth and Fourteenth amendments at both his initial sentencing and on appeal, the state trial and appellate court violated Schad’s rights to a full and fair hearing before a sentencer who considered and gave effect to all his relevant mitigation evidence, and to a meaningful appellate review. *Tennard v. Dretke*, 542 U.S. 274 (2004); *Hitchcock v. Dugger*, 481 U.S. 393(1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). When it is not clear whether the sentencer actually considered all the mitigation, the appellate court may not speculate about the sentencer’s thinking, but instead must remand the case to the trial court to resolve any ambiguity. *Eddings*, at 119 (O’Connor, J., concurring). This Court should set aside Schad’s unconstitutional sentence.

4. Schad's Capital Sentence Is Disproportionate And Unconstitutional In Violation Of The Eighth And Fourteenth Amendments To The United States Constitution. The State's Offer, Pre-Trial, To Schad To Plead Guilty In Exchange For A Life Sentence Is Evidence That Schad Is Not The Worst Of The Worst And That No Societal Need Exists For His Execution. See *United States v. Jackson*, 390 U.S. 570 (1968); *Adamson v. Lewis*, 955 F.2d 614, 617 (9th Cir. 1992) (Holding "The State's Decision To Seek The Death Penalty After Previously Agreeing To A Term Of Imprisonment Raised A Presumption Of Prosecutorial Vindictiveness Sufficient To Warrant A Remand To The District Court For An Evidentiary Hearing....").

Pursuant to the Sixth, Eighth, and Fourteenth Amendments, Petitioner Ed Schad respectfully moves this Court to grant him post-conviction relief because the imposition of the death sentence, following the prosecution's offer of life sentences, was unconstitutional and a violation of (1) the Sixth Amendment as interpreted by *United States v. Jackson*, 390 U.S. 570 (1968); (2) the Eighth Amendment proscription against the arbitrary imposition of the death penalty; and (3) the Fourteenth Amendment as it relates to Mr. Schad's fundamental right to life. Put differently, the imposition of the death sentence following an offer of a life sentence burdened Ed Schad's constitutional right to a jury trial and right not to plead guilty under the Sixth Amendment, to be free from the arbitrary infliction of death under the Eighth Amendment, and it violated Mr. Schad's right to due process and equal protection under the Fourteenth Amendment, given his fundamental right to life.

- A. The Death Sentence Is Unconstitutional Because It Violates The Sixth, Eighth, And Fourteenth Amendments

Ed Schad's death sentence must be vacated because it was imposed following the prosecutor's offer of a parole eligible life sentence – a sentence he has now effectively served. Under the circumstances, the death sentence violates Mr. Schad's rights under the Sixth, Eighth, and Fourteenth Amendments. Having offered a life sentence, the

prosecution conclusively acknowledged that this case did not warrant the death penalty. The prosecution, however, conditioned the imposition of the noncapital sentence upon Schad's waiver of his right to trial. Once Mr. Schad refused to waive his right to a jury trial, the prosecution proceeded to trial asking for, and ultimately securing, a death sentence. The imposition of the death sentence under these circumstances is unconstitutional.

The primary effect of the prosecution's offering life if Schad pleaded guilty and seeking death if he went to trial was to burden Schad's right to seek a trial in this matter. Indeed, once the prosecution acknowledged that life was the appropriate sentence here, the only conceivable reason for seeking the death penalty at trial was to penalize Schad for exercising his constitutional rights.

Therefore, the death sentence was imposed in direct violation of *United State v. Jackson*, 390 U.S. 570 (1968). In *Jackson*, the federal kidnapping statute precluded imposition of the death sentence on a plea of guilty, however the defendant faced the death sentence if he sought a trial. Under such a regime, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." *Jackson*, 390 U.S. at 581. An inevitable effect of such a regime is to "deter exercise of the Sixth Amendment right to demand a jury trial" and to "penaliz[e] those who choose to exercise" that right. *Id.* The Supreme Court in *Jackson* struck down that regime, holding that the government "cannot impose [the death] penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Jackson*, 390 U.S. at 583.

According to *Jackson*, it is unconstitutional for the government to employ a death-penalty regime which “permit[s] imposition of the death sentence only upon a jury’s recommendation and thereby ma[kes] the risk of death the price of a jury trial.” *Brady v. United States*, 397 U.S. 742 (1970). See also *Lockett v. Ohio*, 438 U.S. 617-18 (1978) (Blackmun, J., concurring) (Ohio death sentence unconstitutional under *Jackson* where, upon pleading guilty, defendant would receive life, but would face death sentence upon exercise of right to trial). There is no logical difference between the situation here and the one in *Jackson*. In *Jackson*, the burden was statutorily created, while here, the burden was created by the prosecution’s offer, but in both cases, the defendant was subjected to a state-created burden upon the exercise of his constitutional right to trial by jury. Exactly as in *Jackson*, therefore, Schad is entitled to relief, because his Sixth Amendment rights were violated.

B. The Prosecution’s Pre-Trial Offer Of Life And Then Seeking Death At Trial Violates The Eighth Amendment’s Proscription Against The Arbitrary Imposition Of The Death Penalty

In addition, the prosecution violated the Eighth Amendment proscription against the arbitrary imposition of the death penalty when it offered Ed Schad life pre-trial and then sought death at trial. It is wholly arbitrary for the state to agree that life is an appropriate sentence, one that would allow for his release, but then seek death afterwards. Such a tactic smacks of gamesmanship with the Constitution and roulette with the defendant’s life. The case against Mr. Schad was identical at the plea stage as it was at trial; thus, it is arbitrary for the state to impose a death sentence when a life sentence had previously been deemed to be wholly appropriate. See *Adamson v. Ricketts*, 865 F.2d 1011 (9 th Cir. 1988)(en banc) (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).

C. In Offering Life Pre-Trial, The Prosecution's Seeking Of Death Violated Ed Schad's Fundamental Right To Life

In offering a life sentence pre-trial, the prosecution has shown that the imposition of the death sentence is not "necessary to promote a compelling state interest" under the Fourteenth Amendment's due process and equal protection guarantees. According to Supreme Court precedent, when a party's fundamental rights are at stake, under principles of substantive due process and equal protection, the state cannot deprive the individual of that right unless such deprivation is both: (a) necessary to promote a compelling state interest; and (b) the government uses the least restrictive means of achieving that interest. See e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). In particular, the Fourteenth Amendment's guarantee of due process of law includes a substantive component, which forbids the government from infringing any fundamental right "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Here, with Ed Schad's fundamental right to life at issue, the prosecution's offer to life sentences conclusively demonstrates: (a) there is "no compelling state interest" in executing Mr. Schad, for if there were, the District Attorney never would have offered life; (b) taking Mr. Schad's life is not "necessary" to promote any state interest because the District Attorney's willingness to accept life as a punishment shows that a death sentence was not, as is not, "necessary" to promote any state interest whatsoever; and (c)

there is a less restrictive means of achieving all of the state's interests in punishing Mr. Schad (namely, a sentence of life) which was made clear by the fact that the District Attorney previously agreed to life sentences as the appropriate and acceptable punishment under the circumstances. This is particularly true where, after more than three decades of incarceration, Mr. Schad has maintained a spotless institutional record. Arizona Department of Corrections Officer Gabriel Laguna has sworn, "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." Declaration of Gabriel Laguna, Exhibit []. Corrections Officer Ronald Labrecque, who was Schad's maintenance supervisor when Schad was housed in Florence, swore:

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 assigned to me because he was easy to get along with, he never gave anybody trouble and he [was] always cheerful about completing any tasks I asked him to do. He was a good worker, and 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.

Declaration of Ronald Labrecque, Exhibit [].

Thus, where the prosecution offered life before trial, but sought and received death after trial, Mr. Schad's death sentence was imposed in violation of his Sixth, Eighth, and Fourteenth Amendments. This Court should so conclude.

5. Ed Schad's Capital Sentence is Based on His Conviction for Engaging in Homosexual Behavior in Utah in the 1960's in Violation of *Lawrence v. Texas*.

Two of the aggravating circumstances used to sentence Schad to death are based on a unconstitutional prior conviction – felony murder where the felony was homosexual

sodomy and the victim was a willing participant. Under the law at the time of Schad's original death sentence, and the law today, Schad could not have been sentenced for second degree murder in either Utah or Arizona. Utah made consensual sodomy a misdemeanor in 1969. §76-53-22, Utah Code Ann. (1953), as amended by Laws, 1969, Ch. 244, §1. Arizona made consensual sodomy a misdemeanor in 1977. A.R.S. §13-1412.

Moreover, the appellate court found Schad's conviction the equivalent of second degree murder under Arizona law. The Utah Supreme Court recognized similar conduct constitutes manslaughter in *State v. Bolsinger, supra*. At the time of Schad's sentencing, second degree murder was not a crime for which life or a sentence of death was imposable under Arizona law. A.R.S. §13-1104 (1977).¹

Although Schad's Utah conviction did not establish an aggravating circumstance under either §3-454(E)(1) or §3-454 (E)(2), the trial court unconstitutionally weighed this single conviction twice in its sentencing calculus. This error was not harmless.

A state's capital sentencing scheme must provide guided discretion to the sentencer to avoid arbitrary and capricious imposition of the death penalty. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). To withstand constitutional scrutiny a state's capital sentencing scheme must also be consistent with "evolving standards of decency." *Woodson v. North Carolina, supra*, 428 U.S. at 301.

Schad's sentence is not consistent with evolving standards of decency. The death sentence in Schad's case based on the Utah prior conviction is "wanton and freakish." It bears repeating that at Schad's first sentencing, the trial court relied solely on the Utah

prior conviction to support the death sentence. Without that conviction, Schad would have received life. Even on re-trial, the state could not have sought the death penalty. *Bullington v. Missouri, supra*. Schad's prior conviction was based on an accident arising from consensual conduct. Only one other person has been convicted of second degree murder for similar conduct; that defendant's conviction was reduced to manslaughter by the Utah Supreme Court. *State v. Bolsinger, supra*.

Given the changes in Arizona and Utah law, even at the time of Schad's first sentencing, the imposition of the death penalty based on Schad's prior conviction violates the constitution. U.S.Const., 5th, 8th, 14th Amds. As such, it cannot be used to support a death sentence. *Johnson v. Mississippi*, 486 U.S. 578 (1988). Schad's Utah conviction was obtained in violation of the Fifth and Fourteenth Amendments in that he was denied appellate due process. On direct appeal from his 1968 conviction, Schad challenged the legality of his conviction of second degree felony murder. In dismissing this argument, the court erroneously found that Schad's conduct evidenced a "depraved mind." In so doing, the Utah Supreme Court used the definition of first degree murder and ignored the trial court's finding that, in fact, Schad's conduct did not constitute a "depraved mind." The Utah Supreme Court's erroneous use of the first degree murder statute notwithstanding, *State v. Bolsinger, supra*, held the exact same conduct did not constitute "depraved indifference." At the time of Bolsinger's case, the Utah Code had been re-written such that "depraved indifference" constituted second degree murder. In reversing Bolsinger's conviction, the court said:

To constitute depraved indifference, the act must be one "which has been rather well understood at common law to involve something more serious than mere recklessness alone which has had an incidental tragic result." ... There must be a knowing doing of an uncalled-for act in callous disregard of its likely harmful

effect on a victim, which is so heinous as to be equivalent to a “specific intent” to kill. ... Depraved indifference to human life is characterized by unmitigated wickedness, extreme inhumanity or acts exhibiting a high degree of wantonness. . .

Id., 699 P.2d at 1220 (citations omitted). The only difference between *Bolsinger* and Schad’s case is that the defendant in *Bolsinger* was involved in a heterosexual act. If the decedent here had been female, Schad would not have been convicted of second degree murder, and would not be under sentence of death today. The Utah court’s failure to fairly and consistently apply the law in Schad’s case denied him appellate due process and fundamental fairness.

Schad’s Utah conviction is also unconstitutional because it violates equal protection. *Bolsinger* demonstrates that had Schad been engaged in a heterosexual act, rather than a homosexual act, he would not have been convicted of second degree murder. The law, even though neutral on its face, was used to mete out a disproportionate punishment to homosexuals based solely on sexual orientation. That violates equal protection under the fourteenth amendment.

Further, Schad’s Utah conviction for second degree felony murder during the course of a consensual sodomy is unconstitutional because the Utah and Arizona laws criminalizing this behavior are unconstitutional. The Utah and Arizona sodomy laws violate the constitutional right to privacy and the equal protection clause. Although the sodomy laws are neutral on their face, they are used primarily against homosexuals and discriminate amongst citizens based on sexual orientation. See Kogan, Legislative Violence Against Lesbians and Gay Men, 1994 Utah L. Rev. 209 (1994).

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court overruled its decision in *Bowers*, concluding that a substantive due process right to private consensual

sex exists between adults that encompasses homosexual sodomy. This decision made laws such as the one used for Schad's Utah murder conviction unconstitutional. The ruling in *Lawrence*, therefore, constituted an exception to the general rule of non-retroactivity of Supreme Court rulings for cases on collateral review because it "placed 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 489 U.S. 288, 307 (1989), quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)(J. Harlan, writing separately). See also *Anderson v. Morrow*, 371 F.3d 1027, 1033 (9th Cir. 2004)(noting that *Lawrence's* ruling can be applied retroactively.)

It is true that Schad's opportunity to challenge the constitutionality of his Utah conviction on the ground of the unconstitutionality of the sodomy law has passed. See *Anderson*, 371 F.3d at 1034 (J. Berzon, dissenting in part)(*Lawrence* has no bearing on the question whether a defendant is entitled to habeas relief based on the state court proceedings completed in 1998). But *Lawrence* raises the specter of an arbitrary and capricious killing here where Schad's private sexual conduct that should never have been subjected to criminal prosecution is the basis for his death sentence.

As discussed above, the Utah conviction was based on thinly veiled legislative and judicial animosity toward homosexuality. It was offered and accepted as a basis for Arizona to kill Schad—that he had a history of violent felonies—in a similar climate. Now, not only has the "violence" that was exclusively attributed to homosexual intercourse by the Utah and Arizona courts been exposed as baseless, criminal law no longer even reaches such conduct. To continue to validate the 1968 conviction as an aggravating factor runs contrary to longstanding principle that the Eighth Amendment is "guided by

the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86,100 (1958).

Furman v. Georgia, 408 U.S. 238 (1972), ruled that random and arbitrary infliction of the death penalty violates the Eighth Amendment protection against cruel and unusual punishment. In upholding the revised Georgia capital sentencing statute in *Gregg v. Georgia*, 428 U.S. 153, the Court required capital sentencing processes be “directed and limited ...to minimize the risk of wholly arbitrary and capricious action,” *id.*, at 188 (Stewart, Powell, Stevens, JJ.), and approved the means of limiting the sentencer’s discretion in imposing death by ““opening the record [at sentencing] to the further information that is relevant to sentence.”” *Id.* at 191, quoting ALI, Model Penal Code §201.6, Comment 5, pp. 74-75 (Tent.Draft No. 9,1959)(emphasis added). The Court concluded that a sentencing process by which “the sentencing authority is apprised of the information relevant to the imposition of sentence” could overcome the constitutional violations identified by *Furman*. 428 U.S. at 195 (emphasis added).

Time 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,² evolved standards of our society and legal system now recognize such matters are an “integral part of human freedom.” *Lawrence*, 539 U.S. at 577. *See also Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)(relying on *Lawrence* to reject attorney general’s position that homosexual asylum applicant could be safely removed to his home country as long as he remained celibate). Just as the federal courts have retroactively vacated death sentences imposed

on juveniles and the mentally retarded out of recognition that the sentencing authority did not take account of a factor it should have, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002), so, too, this Court should recognize that the sentence imposed on Schad considered factors society's evolved standards of decency now instruct it should not have.

Here, discrimination was taken to its extreme. Had the trial court not initially found the Utah conviction to be an aggravating circumstance, Schad would never have been eligible for the death penalty. The result is that Schad was sentenced to death solely on his sexual orientation. Such a result is "wanton and freakish" and violates the Constitution, 5th, 8th, 14th Amds.

Schad was prejudiced by the trial court's erroneous reliance on the (E)(1) and (2) aggravators. Had the first judge not found these aggravating circumstances, Schad would not have been subject to death. The subsequent finding of these aggravators weighed heavily in the trial court's decision to sentence Schad to death at the second sentencing. Because Schad's death sentence is based on these unconstitutional aggravators, this Court should grant relief here, vacate Schad's death sentence, and remand to the Arizona courts for appropriate proceedings. *See Richmond v. Lewis*, 506 U.S. 40, 46 (1992)(in a weighing state, "it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain.").

The unconstitutional use of Schad's prior conviction to support his capital sentence had a substantial and injurious effect on the outcome of the sentence, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), especially when considered together with the court's

error in refusing to consider relevant mitigating evidence, *see, infra*, Schad is entitled to post-conviction relief.

6. Execution Of Schad Now, After He Has Effectively Served A Life Sentence, Constitutes Cruel And Unusual Punishment.

Schad's extraordinary, unblemished record of good character and conduct throughout his 34-year incarceration on Arizona's death row that includes the complete absence of disciplinary actions, excellent work ethic and pursuit of available educational opportunities, interactions with prison counselors, guards, wardens and others at the prison facility, See Exs. T-U, make clear that to execute Schad now, after he has effectively served a life sentence, would violate the Eighth and Fourteenth Amendments and evolving standards of decency. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995)(State's excessive delay in carrying out a death sentence raises a "claim that [the] execution, following these lengthy proceedings, would violate the Constitution's prohibition of 'cruel and unusual' punishments."); *Foster v. Florida*, 537 U.S. 990, 991-992 (2002)(Breyer, J., dissenting); *State v. Richmond*, 886 P.2d 1329, 1336 (Ariz. 1994)(despite two murder convictions, "evidence of defendant's changed character [] necessarily impacts the weight of the (F)(1) factor here. If defendant has indeed changed, as the evidence strongly suggests, he is no longer the same person he was when he committed either of these crimes.").

Schad requests this Court grant him relief based on these constitutional violations, or at the least a hearing here he can present these facts and witnesses to support his entitlement to relief from his unconstitutional sentence, or alternatively, a new sentencing hearing.

Dated this 20th day of December, 2012.

Denise I. Young

Attorney for Petitioner Edward Schad

Copies of the foregoing mailed
this 20th day of December, 2012, to:

Kent Cattani
Jon Anderson
Assistant Attorneys General
1275 W. Washington
Phoenix, AZ 85007-2997

/s/ Denise I. Young
Denise I. Young