

rec'd
10/19/91

ORIGINAL FILED THIS 16
DAY OF Oct 1991
NORBERT G. WEDEFOHL
Clerk Superior Court
By [Signature]
Deputy

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,)
)
Plaintiff,)
vs.)
EDWARD SCHAD, JR.)
)
Defendant.)

NO. 8752

PRELIMINARY PETITION FOR
POST-CONVICTION RELIEF

[PRELIMINARY NOTE]: This preliminary petition is prepared by counsel who has not had the opportunity to review the entire file and record or to conduct necessary investigation outside the record. The petitioner has not had an opportunity to review his record and file with counsel nor has defendant had an opportunity to investigate this case outside of the record. This preliminary petition is being filed without proper review of the record, consultation with petitioner or necessary investigation because petitioner's execution is presently scheduled for December 27, 1991.

It is clear, however, that all potential legal and factual issues must be investigated by appointed counsel in this post-conviction proceeding as soon as possible. McClesky v. Zant, 111 S.Ct. 1454 (1991). Thus, petitioner files this preliminary petition requesting the appointment of counsel, sufficient time to allow counsel to review the

1 file and records and conduct all necessary investigation
2 and to amend this preliminary petition raising additional
3 claims for relief from his capital conviction and
4 sentence.]

5 1. My name is Edward Harold Schad. My prisoner
6 number is 40496. I was convicted and sentenced to death
7 for a homicide that occurred in Yavapa County, Arizona on
8 or about August 1, 1978.

9 2. I am in custody in the Arizona State Prison in
10 Florence under sentence of death. I was convicted and
11 sentenced in the Yavapa County Superior Court with Judge
12 Richard Anderson presiding. My death sentence was affirmed
13 by the Arizona Supreme Court on December 14, 1989. My
14 petition for a writ of certiorari to the United States
15 Supreme Court was granted on October 9, 1990, on two issues
16 challenging the constitutionality of my conviction. On
17 June 21, 1991, the United States Supreme Court, by a 5-4
18 vote denied me relief on those issues. Schad v. Arizona,
19 111 S.Ct. 2491 (1991). My motion for rehearing was denied
20 on September 13, 1991. The Arizona Supreme Court has
21 scheduled my execution date on December 27, 1991.

22 3. I believe I was convicted and sentenced in
23 violation of my state and federal constitutional rights.

24 4. This is my first petition for post-conviction
25 relief following my 1985 trial. I had been convicted and
26 sentenced to death in a 1979 trial arising out of the 1978
27
28

1 homicide, see State v. Schad, 129 Ariz. 557, 633 P.2d 366
2 (1981), cert. denied, 455 U.S. 983 (1982), but that
3 conviction and sentence were reversed by the Arizona
4 Supreme Court when it reviewed my petition for post-
5 conviction relief, and granted me relief. State v. Schad,
6 142 Ariz. 619, 691 P.2d 710 (1984). Other than these
7 appeals identified above, I have not filed for any other
8 state or federal post-conviction relief.

9 5. At my 1979 trial, my direct appeal, my petition
10 for certiorari, my post-conviction proceedings pertaining
11 to the 1979 trial and my retrial in 1985, I was represented
12 by Charles Anthony Shaw, 223 E. Union, Prescott, Arizona.
13 At my direct appeal from my 1985 trial, I was represented
14 by S. Alan Cook, 2198 E. Camelback, Suite 240, Phoenix,
15 Arizona. I was represented by Denise Young and John Bailey
16 of the Arizona Capital Representation Project, ASU College
17 of Law, Tempe, Arizona in my petition for writ of
18 certiorari and resulting proceedings before the United
19 States Supreme Court.

20 6. Ms. Young has informed me that she is unable to
21 represent me in state post-conviction proceedings.
22 Therefore, I do not currently have a lawyer.

23 7. I am indigent and have no substantial assets.
24 I have no training in the law and I am not able to
25 represent myself.

26 8. I believe any or all of the following claims
27
28

entitle me to relief from my conviction and death sentence:

1
2 8.1. Petitioner was denied his right to a fair
3 trial and due process of law in violation of the Fifth,
4 Sixth, Eighth and Fourteenth Amendments of the United
5 States Constitution and art. 2, §§4, 15, 23 and 24 of the
6 Arizona Constitution by the summary order of the trial
7 court denying the petitioner's motion for the appointment
8 of an expert witness (Otto Bendheim, M.D.). June 14, 1985
9 Minute Entry.

10 Petitioner's trial counsel noted in his motion for
11 the appointment of an expert witness that the basic theory
12 of the defense was either that someone else killed the
13 alleged victim, Mr. Groves, or that he committed suicide.
14 Trial counsel explained that under either potential defense
15 theory, the mental status of the decedent was relevant and
16 material. The decedent's mental status could establish
17 either the cause of death (suicide) or be shown as a factor
18 contributing to the death (homicide by one other than the
19 petitioner). Trial counsel cited information known to the
20 state and the defense that Mr. Grove had a medical history
21 of schizophrenia. Additionally, discovery received by the
22 defense from the state just prior to the time that the
23 motion was brought by petitioner's trial counsel indicated
24 that Mr. Grove's behavior was becoming increasingly
25 disorganized and bizarre in the months and days leading up
26 to his departure from Bisby for Everett, Washington.

1 denied petitioner's trial counsel the opportunity to
2 inquire into the nature and extent of any hearing
3 impairment, or whether the problem could have been
4 addressed by jury seating, or the use of microphones or
5 other sound amplification.

6 8.3. The court's actions with regard to venireman
7 Larry Reed during jury selection violated petitioner's
8 right to a fair trial and due process of law in violation
9 of the Fifth, Sixth, Eighth and Fourteenth Amendments of
10 the United States Constitution and art. 2, §§4, 15, 23 and
11 24 of the Arizona Constitution. Again, sua sponte, after
12 reconvening on the morning of June 19, 1985, the court
13 brought Mr. Reed into chambers to inquire into alleged
14 criminal convictions of his siblings. The court's actions
15 were over the objection of petitioner's trial counsel, and
16 based on information that the court received outside the
17 record and which was identified only as hearsay information
18 received by the judge personally after the evening recess
19 on the prior day. Mr. Reed was one of the last jurors
20 questioned by the court on the previous evening and was a
21 juror who expressed the desire to be excused for reasons
22 of financial hardship, asserting that he was basically
23 indigent or about to become indigent.

24 This juror indicated, upon inquiry by the court,
25 that he knew some policemen whom he could believe and knew
26 some that were not necessarily believable, based on the

1 experiences of his brothers. Mr. Reed basically stated
2 that his inclination was toward the defendant in a criminal
3 case, i.e., it was consistent with the presumption of
4 innocence and proof beyond a reasonable doubt. The
5 statements by the court, however, characterized this as
6 indicative of Mr. Reed's inability to be fair. Again
7 because of the court's summary procedure removing Mr. Reed
8 from the panel, petitioner was denied the opportunity to
9 inquire as to what Reed's statements actually meant in
10 contrast to only the court's characterization.

11 This procedure denied petitioner the right to a
12 representative cross-section of the community and, thus
13 the right to a fair and impartial jury.

14 8.4 Petitioner was denied a fair trial and the
15 right to due process under the Fifth, Sixth, Eighth and
16 Fourteenth Amendments of the United States Constitution and
17 art. 2, §§4, 15, 23 and 24 of the Arizona Constitution by
18 the court's giving of an instruction which defined murder
19 as being able to be committed by virtue of the existence
20 of malice inferred from the use of a deadly weapon, without
21 instructing the jury on the definition of a deadly weapon.
22 By doing so the court failed to instruct the jury on an
23 essential element of the offense -- the mens rea.

24 8.5 Petitioner was denied the right to be present
25 at every critical stage of the proceedings during a capital
26 murder trial in violation of his constitutional rights to

1 a fair trial and due process of law, when his trial counsel
2 made a motion for a mistrial on the record in chambers
3 without petitioner being present. After that motion was
4 denied and the court and counsel dealt with three other
5 matters, the court inquired of the trial counsel for
6 petitioner if trial counsel waived petitioner's presence.
7 Trial counsel answered that he did. Petitioner was never
8 consulted and there was no inquiry by the court as to
9 whether in fact petitioner wished to waive his presence at
10 this critical stage in the proceedings. Petitioner did not
11 knowingly, intelligently, and voluntarily waive his
12 presence at this proceeding.

13 8.6 The trial court denied the petitioner the right
14 to a fair trial and the right to due process of law in
15 violation of his rights under the Fifth, Sixth, Eighth and
16 Fourteenth Amendments of the United States Constitution and
17 art. 2, §§4, 15, 23 and 24 of the Arizona Constitution, by
18 granting the state's motion to prohibit trial counsel from
19 offering the decedent's medical records as they related to
20 his mental condition contemporaneous with his death. Trial
21 counsel made an oral offer of proof as to their content and
22 relevancy, i.e., that the decedent was suffering from an
23 [organic] brain syndrome and schizophrenia, both of which
24 had been untreated for several years and that the
25 decedent's mental status would be material to Mr. Groves'
26 death.

1 8.7 Petitioner was denied the right to due process
2 and a fair trial when the trial court denied his motion for
3 a directed verdict of acquittal at the conclusion of the
4 prosecution case, in violation of the Fifth, Sixth, Eighth
5 and Fourteenth Amendments of the United States Constitution
6 and art. 2, §§4, 15, 23 and 24 of the Arizona State
7 Constitution. The accused in a criminal case may not be
8 convicted of a crime unless it is by proof beyond a
9 reasonable doubt. The nature of the evidence against the
10 defendant as to the homicide can be characterized as
11 circumstantial at the very best. The evidence against
12 petitioner at trial was not sufficient to raise to the
13 level of proof beyond a reasonable doubt on the essential
14 elements of the offense of first degree murder.

15 8.8 Petitioner was denied the effective assistance
16 of counsel under the Sixth and Fourteenth Amendments to the
17 United States Constitution and art. 2, §23 of the Arizona
18 Constitution when his trial counsel failed to ask for
19 reconsideration of the court's summary denial of the motion
20 to appoint an expert witness. Reasonably competent counsel
21 would have taken note of the court's ruling, moved to
22 reconsider, and moved to make an offer of proof with regard
23 to the preliminary findings that Dr. Bendheim had made
24 prior to the court's ruling, and made an offer of proof
25 through Dr. Bendheim that Bendheim's services were
26 essential to the investigation of the defenses being

1 proffered by petitioner.

2 Trial counsel was also ineffective in presenting the
3 offer of proof with regard to Mr. Groves' mental health
4 record because: 1) he failed to present an offer of proof
5 by question and answer when the custodian of the records
6 and the records themselves were present and available for
7 examination; and 2) he did not present evidence which was
8 reasonably available that a person suffering from the
9 mental diseases or disorders which Mr. Groves was suffering
10 from could have committed suicide in the manner in which
11 the death occurred.

12 The prejudice at trial was manifest: not only was
13 petitioner denied the opportunity to investigate and
14 develop evidence, petitioner was denied the opportunity to
15 present evidence which would have been particularly
16 relevant on the issue of who committed the homicide or
17 whether it was suicide. Additionally, by failing to move
18 for reconsideration and leaving the basis for the court's
19 ruling unstated by virtue of its summary ruling, trial
20 counsel was ineffective and deprived petitioner and
21 successor counsel of an adequate record upon which to raise
22 appealable issues.

23 8.9 The purpose of the aggravation/mitigation
24 hearing is to determine the character and propensities of
25 the defendant and to ensure that the punishment fits the
26 offender and not merely the crime. To ensure that the

1 punishment fits the offender as well as the crime, the
2 sentencer in a capital case must consider and give effect
3 to all relevant mitigating evidence.

4 At sentencing this court had undisputed relevant
5 mitigation evidence that the state had offered petitioner
6 a life sentence if he would agree to plead guilty to first
7 degree murder. The trial court, however, rejected this
8 evidence as a mitigating circumstance. August 29, 1985
9 Transcript at 9.

10 The trial court's failure to properly consider and
11 give weight to this undisputed mitigating circumstance
12 violated petitioner's right to a reliable, individualized
13 sentencing hearing and the Eighth and Fourteenth Amendments
14 and art. 2, §§4, 15, 23 and 24 of the Arizona Constitution.

15 8.10 Undisputed mitigation evidence was presented
16 that defendant was raised in an abusive, unstable and
17 alcoholic family and that petitioner was beaten severely
18 by his father and forbidden to interact with other
19 children.

20 The trial court's rejection of this mitigation
21 evidence, August 29, 1985 Transcript at 8, violated
22 petitioner's rights Eighth and Fourteenth Amendments of
23 the United States Constitution and art. 2, §§1, 4 and 15,
24 of the Arizona Constitution.

25 8.11 In its independent review of the
26 appropriateness of the death penalty in this case, the

1 Arizona Supreme Court failed to consider the mitigating
2 evidence found by the trial court. The Court discussed the
3 mitigating circumstances of rehabilitation and exemplary
4 conduct in prison and found each to be insufficient to call
5 for leniency.

6 In addition to these mitigating circumstances, the
7 trial court found that petitioner is a good worker, has
8 artistic talent, is helpful, charitable and cares for
9 people. The court found that he has taken many college
10 courses and earned superior grades and has a good stable
11 character. August 29, 1985 Transcript at 8.

12 The Arizona Supreme Court failed to consider and
13 give effect to these mitigating circumstances and denied
14 petitioner a right to a meaningful appellate review and due
15 process under the Sixth, Eighth and Fourteenth Amendments
16 of the United States Constitution and art. 2, §§4, 15, 23
17 and 24 of the Arizona Constitution.

18 8.12 In its independent review of petitioner's
19 capital sentence, the Arizona Supreme Court failed to weigh
20 together the mitigating circumstances found to determine
21 if leniency was warranted. Instead, the Court weighed each
22 mitigating circumstance it considered (rehabilitation and
23 petitioner's exemplary behavior in prison), by itself
24 against the totality of the aggravating circumstances.

25 The Arizona Supreme Court's failure to weigh all the
26 mitigating circumstances together as a whole violated

1 petitioner's rights under the Eighth and Fourteenth
2 Amendments and art. 2, §§1, 4, and 15 of the Arizona
3 Constitution.

4 8.13 In its opinion, the Arizona Supreme Court
5 rejected the mitigating circumstance of exemplary behavior
6 in prison, because they did not excuse petitioner's
7 criminal conduct. State v. Schad, 163 Ariz. at , 788 P.2d
8 at . ("[A]lthough the defendant has continued to show
9 exemplary behavior while incarcerated, we do not find this
10 to be sufficiently substantial to call for leniency.").

11 The Arizona Supreme Court's exclusion from
12 consideration of mitigating circumstances which do not
13 excuse petitioner's conduct violated petitioner's rights
14 under the Eighth and Fourteenth Amendments, art. 2, §§1,
15 4, and 15 of the Arizona Constitution and A.R.S. §13-
16 703(G).

17 8.14 In Arizona, the Supreme Court, as a matter of
18 state law, conducts a proportionality review of death
19 sentences to assure that no such sentence is excessive when
20 compared to the sentences imposed for similar crimes and
21 for similar offenders.

22 A comparative proportionality review is
23 constitutionally required in an Arizona death penalty
24 appeal under case law and Article 2 §§ 1,4, and 15 of the
25 Arizona Constitution. Additionally, Arizona's practice of
26 doing proportionality review gives rise to due process

1 rights that it be done properly regardless of whether the
2 federal constitution would otherwise require
3 proportionality review.

4 Neither the Arizona capital-sentencing statute nor
5 the Arizona Supreme Court specifies what class of case it
6 might compare petitioner's with to assess the comparative
7 proportionality of petitioner's death sentence;
8 petitioner's trial and appellate counsels were, therefore,
9 unable to render petitioner effective assistance at
10 sentencing and on appeal.

11 The Arizona Supreme Court could not have
12 systematically compared petitioner's death sentence for
13 proportionality to the sentences imposed in like cases
14 because it did not have before it any regularized and
15 reliable source of information about other potentially
16 similar cases to identify cases similar to petitioner's in
17 order to compare the sentences typically handed out in such
18 cases to the one handed out in petitioner's case.

19 A systematic review would include, at a minimum,
20 consideration of cases where the facts of the killing were
21 as egregious or more so than those of petitioner's case but
22 a life sentence was imposed. Had the Arizona Supreme Court
23 considered such cases, petitioner's death sentences would
24 have been reduced to life as disproportionate.

25 The court's failure to conduct a proper
26 proportionality review of petitioner's case prejudiced

1 petitioner and violated rights under the Fifth, Eighth, and
2 Fourteenth Amendments and under Article 2 §§ 1,4, and 15
3 of the Arizona Constitution. The manner in which the
4 Supreme Court conducts its proportionality reviews makes
5 the imposition of the death penalty in Arizona generally
6 and in petitioner's case in particular, arbitrary and
7 capricious and therefore a violation of petitioner's rights
8 under the Eighth and Fourteenth Amendments and under
9 Article 2 §§ 1,4, and 15 of the Arizona Constitution.

10 The court's failure to give notice to petitioner's
11 appellate counsel as to what class of cases it might
12 compare petitioner's case with, violated petitioner's due
13 process right to notice and right to be heard and resulted
14 in appellate counsel's failure to effectively represent
15 petitioner in the proportionality review of his case and
16 denied petitioner his right to effective assistance of
17 counsel under the Sixth and Fourteenth Amendments and under
18 Article 2 §§ 1,4, and 24 of the Arizona Constitution.

19 8.15 Arizona grants the right to jury trial, by
20 state court rule and under the state constitution, on
21 factual issues that serve as aggravating circumstances in
22 the sentencing decision. Capital defendants, however, are
23 give no such right.

24 Irrational and unfair distinctions made by a state
25 court in the application of state law violate the Equal
26 Protection Clause of the Fourteenth Amendment.

1 Competent counsel would not have failed to raise
2 these issues on appeal.

3 Appellate counsel's omissions prejudiced
4 petitioner's case because the Arizona Supreme Court
5 affirmed petitioner's conviction and death sentence without
6 considering issues neglected by appellate counsel and
7 without the benefit of the careful, partisan scrutiny of
8 a zealous advocate. Petitioner was thus denied his rights
9 under the Sixth and Fourteenth amendments and under art.
10 2 §§1, 4 and 24 of the Arizona Constitution.

11 PRAYER FOR RELIEF

12 8.19. The petitioner requests that this court:

13 Discharge the petitioner from his
14 unconstitutional confinement and restraint, relieve him of
15 his unconstitutional sentences of death and imprisonment,
16 grant a new trial or sentencing in accordance with
17 constitutional mandates;

18 Conduct an evidentiary hearing at which proof
19 may be offered concerning the allegations of this petition;

20 Grant petitioner, who is indigent, appointment
21 of counsel and sufficient funds to secure expert testimony
22 and evidence necessary to prove facts as alleged in this
23 petition;

24 Grant petitioner leave to amend this petition
25 after sufficient time to complete review of the record and
26 investigation;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Grant such other and further relief as the
Court deems just and proper.

Edward H. Schad
Edward Harold Schad, Jr.

SUBSCRIBED AND SWORN to before me this 13 day of
December, 1991.

[Signature]
Notary Public

My Commission Expires:

June 1993

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Copies of the foregoing
mailed this 13th day of
December, 1991, to:

Honorable Richard Anderson
Yavapai County Superior Court
Prescott, AZ 86301

Mr. R. Wayne Ford
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007

