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9 ATTORNEYS FOR PLAINTIFF

10
11 ARIZONA SUPERIOR COURT
12 COUNTY OF YAVAPAI

13 STATE OF ARIZONA,

14 PLAINTIFF,

15 -vs-

16 EDWARD H. SCHAD, JR.,

17 DEFENDANT.

CR-8752

RESPONSE TO DEFENDANT'S
PRELIMINARY AND SUPPLEMENTAL
PETITIONS FOR POST-CONVICTION
RELIEF

(THE HON. RICHARD ANDERSON)

18
19 Plaintiff, pursuant to Rule 32.6(a), Arizona Rules of Criminal Procedure, hereby responds to
20 Defendant's preliminary and supplemental petitions for post-conviction relief. For the reasons set forth
21 in the following Memorandum of Points and Authorities, Plaintiff respectfully submits that Defendant
22 is not entitled to post-conviction relief as a matter of law. See Rule 32.6(c) of the Arizona Rules of
23 Criminal Procedure. Consequently, he is not entitled to an evidentiary hearing. Plaintiff respectfully
24 requests that both of the petitions be summarily denied and dismissed with prejudice.

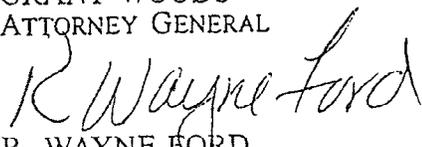
25 In the event that this Court does not dismiss both petitions in their entirety, Plaintiff moves for
26 this Court to specify which claim or claims survive and permit Plaintiff 30 days to respond to those
27 claims on the merits. By eliminating the claims that are clearly precluded, both the court and the
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1 parties will be able to focus on facts and law that may be subject to a future evidentiary hearing. A
2 proposed order is attached to this response as a courtesy.

3 DATED this ^{20th} day of December, 1995.

4 Respectfully submitted,

5 GRANT WOODS
6 ATTORNEY GENERAL

7 
8 R. WAYNE FORD
9 ASSISTANT ATTORNEY GENERAL

10 ATTORNEYS FOR PLAINTIFF

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 A. FACTUAL AND PROCEDURAL BACKGROUND.

13 The following facts are taken from *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981):

14 On August 9, 1978, a badly decomposed body of an elderly male was found
15 approximately 9 miles south of Prescott, Arizona, adjacent to a roadway pull-off on U.S.
16 Highway 89. The body was discovered after a highway department worker had detected
17 the odor of decaying human flesh the previous day while driving past the pull-off.
18 Although the worker and his co-worker had stopped briefly to investigate the odor on
19 August 8, the body was not actually discovered until the next day due to the fact that it
20 was well concealed in the brush. After the corpse was discovered, the Yavapai County
21 Sheriff's Department and the County Medical Examiner observed a small rope tied around
22 the victim's neck. It was later established that the cause of death was strangulation.

23 Because of the advanced state of decomposition, the body was not identified until
24 October 11, 1978, when it was established that the deceased was Lorimer "Leroy" Grove,
25 a 74-year-old Bisbee resident. Grove had last been seen on August 1, 1978, in Bisbee,
26 Arizona. On that morning, Grove left Bisbee driving a new Cadillac, pulling a
27 camper-trailer. His ultimate destination was Everett, Washington, where he had intended
28 to visit his sister.

29 On August 3, 1978, a dark green Ford Fairmont was found abandoned 30 miles
30 north of Flagstaff, Arizona, alongside U.S. Highway 89 by a Department of Public Safety
31 Highway Patrolman. It was subsequently determined that the Fairmont had been rented by
32 the defendant from a Ford dealership in Sandy, Utah, on December 31, 1977. Although
33 the vehicle had been rented for the weekend, it was never returned and had been reported
34 as stolen. The vehicle was turned over to the Coconino County Sheriff's Department and
35 was impounded at a local towing yard. On September 12, 1978, two officers examined the
36 vehicle in connection with an investigation of possible homicide charges against defendant.
37 Several items belonging to the victim were found in the Fairmont, including a mirror
38 device which was identified as being similar to one used by the deceased to hook the
39 trailer to the automobile by himself.

1 On September 3, 1978, defendant was stopped by a New York Highway Trooper,
2 for speeding, while driving the victim's Cadillac. When the defendant could not produce
3 a registration on the vehicle, the officer asked for an explanation. Defendant replied that
4 it wasn't his car but that he was delivering it for a friend to an area 5 or 10 miles from
5 where the officer stopped him. Asked who was the friend was, defendant said he was an
6 elderly gentleman by the name of Larry Grove.

7 Defendant was arrested in Salt Lake City, Utah, on September 8, 1978, for parole
8 violation. Defendant had been on parole from the Utah State Penitentiary where he had
9 been serving a sentence for a second-degree murder conviction. After defendant was
10 arrested and taken into custody, the Cadillac was taken to the Salt Lake City Police
11 Department impound lot where it was searched. Various personal items were found in the
12 car which were identified as belonging to the victim.

13 129 Ariz. at 561-62, 633 P.2d at 370-71.

14 Defendant was tried and convicted of first-degree murder and was sentenced to death. He
15 appealed that conviction to the Arizona Supreme Court, raising 13 issues:

- 16 1. The warrantless search of the Cadillac and Defendant's wallet violated
17 Defendant's Fourth Amendment rights;
- 18 2. An informant's testimony regarding statements made by Defendant while in jail
19 violated defendant's Sixth Amendment rights;
- 20 3. Statements made to various police officers were involuntary;
- 21 4. The trial court improperly restricted voir dire questioning of the jury;
- 22 5. The jurors should have been sequestered;
- 23 6. Defendant was denied his right of confrontation under the Sixth Amendment
24 when the trial court admitted into evidence portions of the suppression hearing
25 transcript concerning written and oral statements of the Defendant;
- 26 7. Defendant's prior prison record should have been admitted;
- 27 8. The State deprived Defendant of a fair trial by failing to make a good-faith
28 effort to obtain fingerprints of the "French people";
9. The trial court abused its discretion in admitting a photograph of the deceased;
10. The evidence was insufficient to support the conviction;
11. The trial court improperly instructed the jury;
12. The death penalty was not properly imposed;
13. A.R.S. § 13-454 is unconstitutional in this case.

That court rejected each of the above contentions of error and affirmed the conviction and
sentence. 129 Ariz. at 574, 633 P.2d at 383.

1 Defendant then filed a petition for post-conviction relief, raising 24 issues. This Court dismissed
2 that petition and Defendant petitioned for review. The Arizona Supreme Court granted relief on one
3 of the issues and denied the remainder. Relief was granted on the issue of the lack of an instruction
4 defining robbery and kidnapping, the felonies underlying the charged offense of murder, premeditated
5 or felony. *State v. Schad*, 142 Ariz. 619, 621, 691 P.2d 710, 712 (1984). The court reasoned that
6 without defining either of the underlying felonies, the jurors would be unable to determine whether
7 a felony murder had taken place. Because the verdict did not distinguish between premeditated and
8 felony murder, the Court remanded for a new trial. 142 Ariz. at 620, 691 P.2d at 711.

9 Defendant was tried and convicted of first-degree murder once again; and once again, this Court
10 imposed a sentence of death. Defendant appealed again, this time raising 10 issues:

- 11 1. Did admitting statements that the Defendant made to John Duncan in the Salt
12 Lake City jail violate the Defendant's constitutional rights?
- 13 2. Was the Defendant denied a fair trial when the State failed to preserve the
14 victim's clothing and preserve fingerprint impressions on items found with the
15 body and on the mirror contraption?
- 16 3. Did the trial court commit error by failing to instruct the jury on, and provide
17 a form of verdict for, the lesser-included offense of robbery?
- 18 4. Did the trial court err when it refused to give forms of verdict for both
19 premeditated murder and felony murder?
- 20 5. Was it proper to use the Defendant's prior murder conviction as an
21 aggravating factor?
- 22 6. Were the Defendant's double jeopardy rights violated when two aggravating
23 factors were found based on a single prior conviction?
- 24 7. Were the Defendant's rights violated when the trial court found that the
25 Defendant committed the murder for pecuniary gain?
- 26 8. Did the court fail to properly weigh the mitigating circumstances?
- 27 9. Did the Defendant's "inability" to "voir dire" the trial judge deprive him of a fair trial?
- 28 10. Is Arizona's statutory death sentencing scheme unconstitutional?

25 The Supreme Court rejected each of the contentions of error and affirmed the conviction and
26 sentence. *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989). Defendant sought *certiorari* review
27 in the United States Supreme Court on two grounds:

- 1 1. Whether a first-degree murder conviction under jury instructions that did not
2 require agreement on whether the Defendant was guilty of premeditated
3 murder or felony murder is unconstitutional?
- 4 2. Whether the principle recognized in *Beck v. Alabama*, 447 U.S. 625, 100
5 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), entitles a defendant to instructions on
6 all offenses that are lesser than and included within a capital offense as
7 charged?

8 The high court found in favor of the State and affirmed Defendant's convictions and penalty.
9 *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

10 Defendant filed a preliminary petition for post-conviction relief on December 13, 1991, raising
11 18 issues. A supplemental petition was filed on October 19, 1995, raising an additional four claims.
12 This Court has ordered the State to respond to these claims.

13 B. APPLICABLE LAW.

14 Rule 32.6(c) of the Arizona Rules of Criminal Procedure sets forth the procedure to be followed
15 after the pleadings have been filed. This Court first reviews all of the pleadings to identify which
16 claims are procedurally precluded. A claim is precluded from post-conviction relief if it is still raisable
17 on direct appeal, if it has been finally adjudicated on direct appeal or in a previous post-conviction
18 relief proceeding, or if it has been waived at trial, on direct appeal, or in previous post-conviction
19 relief proceeding. Rule 32.2(a). Precluded claims shall be summarily dismissed. Rule 32.6(c). Claims
20 that are procedurally precluded are set forth in C below.

21 After summarily dismissing the precluded claims, the court reviews the remaining claims for
22 issues of material fact or law that would entitle the defendant to relief. Rule 32.6(c). Such a claim is
23 defined as a "colorable claim," one that if true, would have changed the outcome of the trial or the
24 sentencing. *State v. Anderson*, 177 Ariz. 381, 385, 868 P.2d 964, 968 (Ct. App. 1993). Any claim
25 that fails to meet this legal standard shall be summarily dismissed. Rule 32.6(c).

26 If there are any claims remaining after this preliminary review, the court shall set a hearing
27 within 30 days. Rule 32.6(c). At the hearing, the court shall hear evidence presented by either party
28 that is relevant to the issues that have not been dismissed. Rule 32.8(a) and (b). The burden is on the
29 Defendant to prove, by a preponderance of the evidence, each of the allegations of fact set forth in
30 his remaining claims. Rule 32.8(c). If he fails to meet this burden, the claim shall be dismissed. Rule

1 32.8(d). If the Defendant is able to prove a constitutional violation with respect to the remaining
2 claims, the State must demonstrate that the error was harmless beyond a reasonable doubt. Rule
3 32.8(c). Error is harmless if it can be said that it did not contribute to the outcome of the trial or
4 sentencing. *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994).

5 At the conclusion of the hearing, the court has 10 days within which to render its findings. Rule
6 32.8(d). It is required to make specific factual findings and state its conclusions of law with respect
7 to each issue that has not been summarily dismissed. *Id.* If it finds in favor of the Defendant, it shall
8 order a new trial or sentence as appropriate to its findings and conclusions. *Id.* If not, it shall order
9 dismissal of the petition.

10 C. ARGUMENTS.

11 1. *Preclusion.*

- 12 a. Defendant is not entitled to post-conviction relief because each
13 of his claims is procedurally precluded as a matter of law.

14 Rule 32.6(c) of the Arizona Rules of Criminal Procedure requires this Court to find a claim
15 precluded from post-conviction relief for any issue that is (1) still raisable on direct appeal, (2) has
16 been finally adjudicated on the merits on appeal or in a previous collateral proceeding, or (3) has been
17 waived at trial, on appeal, or in any previous collateral proceeding. *State v. Wilson*, 179 Ariz. 17, 20,
18 875 P.2d 1322, 1325 (Ct. App. 1993). In the present case, a finding of preclusion is mandatory with
19 respect to each of Defendant's claims because they have either been previously decided on direct
20 appeal or because he waived the issue at trial or on direct appeal by not raising it in either forum.
21 Preclusion requires summary dismissal of the affected claim of error. Rule 32.2.

22 In the Preliminary Petition, preclusion applies to the following claims:

- 23 (1) Claims that have been previously decided.

24 On direct appeal, Defendant raised and the Arizona Supreme Court adjudicated the merits of
25 several claims that are common to claims set forth in Defendant's Preliminary Petition for Post-
26 Conviction Relief:

27 Claim 8.7 Claim of lack of evidence sufficient to support the trial
28 court's denial of the motion for judgment of acquittal
(163 Ariz. at 421, 788 P.2d at 1172; sufficiency of the

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evidence to sustain the finding of pecuniary gain includes evidence sufficient to sustain the conviction).

Claim 8.9 Trial court rejected mitigating circumstance of offer of plea with a sentence of life (163 Ariz. at 421, 788 P.2d at 1172; independent examination of the record).

Claim 8.10 Trial court rejected mitigation circumstance that Defendant was abused as a child (163 Ariz. at 421, 788 P.2d at 1172; independent examination of the record).

Claim 8.11 No meaningful appellate review because the Supreme Court failed to consider the mitigating circumstances—rehabilitation, behavior in prison, good worker, artistic—found by the trial court. (163 Ariz. at 421, 788 P.2d at 1172; expressly rejects each of the listed circumstances).

Claim 8.12 No meaningful appellate review because the Supreme Court weighed mitigating circumstances individually rather than as a group. (163 Ariz. at 421, 788 P.2d at 1172) (“We also conclude that the mitigating circumstances are insufficient to outweigh any single aggravating factor.”)

Claim 8.13 Supreme Court rejected the mitigating circumstance of good behavior in prison (163 Ariz. at 421, 788 P.2d at 1172.)

Claim 8.14 Proportionality review is vague, therefore arbitrary and capricious (163 Ariz. at 422-23, 788 P.2d at 1173-74.)

Claim 8.15 Jury should determine sentencing facts (163 Ariz. at 422, 788 P.2d at 1173.)

In addition to those claims raised in the preliminary petition, Defendant raised and the Arizona Supreme Court adjudicated the merits of three of the four claims that are contained in Defendant’s Amended Petition for Post-Conviction Relief:

Claim 1 Agency relationship of Mr. Duncan. (129 Ariz. at 566, 633 P.2d at 375; 163 Ariz. at 415, 788 P.2d at 1166; “We find no error in denying the Defendant’s motion to suppress.”)

Claim 3 Effective assistance of counsel with relation to the agency issue (Related to Claim 1.)

Claim 4 Prosecutor misconduct with respect to the agency issue (Related to Claim 1.)

1 Because Defendant has had these specific claims adjudicated on direct appeal, he is not entitled
2 to collateral review of those findings. Rule 32.2(a)(2), Ariz. R. Crim. P.; *State v. Pac*, 175 Ariz. 189,
3 190, 854 P.2d 1175, 1176 (Ct. App. 1993).

4 Moreover, the preclusion rule applies to all specifically addressed claims, and to those that are
5 closely related or associated. *State v. Alford*, 157 Ariz. 101, 754 P.2d 1376 (Ct. App. 1988).
6 Consequently, any contention that the present claim—of agency, for example—has not been raised in
7 the present context is meritless. *Id.* Defendant is still precluded from post-conviction review of these
8 issues because they could have, indeed, they *should* have been raised under the basic claim on appeal
9 but were not. *Id.* With respect to the claims set forth above, the State has met its burden of pleading
10 and proof of preclusion by a preponderance of the evidence. This Court should summarily dismiss
11 each of these claims.

12 (2) Claims that have been waived either at trial or on direct appeal.

13 In addition to the previous-decision basis for preclusion that is set forth above, summary
14 dismissal of both petitions is necessary on the preclusion ground of waiver. Rule 32.2(a)(3) states that
15 any claim that has been waived at trial, on appeal, or in any previous collateral proceeding, is
16 precluded from collateral relief. Because Defendant has never raised the following claims either at trial
17 or on direct appeal, he is not entitled to relief as a matter of law, and the claims should be summarily
18 dismissed. *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

19 (a) Claim 8.1—Appointment of expert.

20 Review of the claims raised by Defendant in either opening brief, and review of each of the three
21 Supreme Court opinions that have preceded this action, reflects that Defendant has never raised this
22 claim in any Arizona appellate court. Failure to raise the issue in the appellate brief constitutes a
23 waiver of appellate review. *State v. Styers*, 177 Ariz. 104, 113, 865 P.2d 765, 774 (1993); *State v.*
24 *Holquin*, 177 Ariz. 589, 592, 870 P.2d 407, 410 (Ct. App. 1993). Because Defendant did not raise
25 this claim on direct appeal, and because the Arizona Supreme Court has twice reviewed the conviction
26 for error and found none, Defendant is precluded from collateral review of Claim 8.1 as a matter of
27 law. Rule 32.2(a)(3).

1 (b) Claim 8.2—Summary excusal of hearing impaired jurors.

2 Review of Defendant's opening briefs and the Supreme Court's three opinions establishes beyond
3 a reasonable doubt that Defendant never raised this issue on any of his direct appeals. This failure to
4 raise on appeal constitutes a waiver as set forth in Rule 32.2(a)(3), which mandates a finding of
5 preclusion. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410.

6 Moreover, the trial record reflects that this issue was never raised in the trial court, nor does
7 Defendant suggest that it was. Failure to raise a claim in the trial court waives forever the right to
8 have that claim reviewed, either on direct appeal, *State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d
9 999, 1014 (1994) (failure to object at trial waives the right of appellate review), or on collateral
10 review, *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325 (no Rule 32 relief where the defendant fails to raise
11 the issue at trial).

12 For either of the above reasons, the State has demonstrated by a preponderance of evidence that
13 Defendant is precluded from collateral review of claim 8.2 as a matter of law. Rule 32.2(a)(3).

14 (c) Claim 8.3—Strike for cause of Juror Reed.

15 A review of the trial record reflects that trial counsel did object to the trial court's questioning
16 of Mr. Reed. However, the defendant failed to pursue the issue on direct appeal. The opening brief
17 is void of any claim of error with respect to the procedure or the causal strike of Mr. Reed. The
18 opinion does not discuss the issue, either as a claim of error or as fundamental error. 163 Ariz. 411,
19 788 P.2d at 1162. Because this issue existed at the time of the direct appeal, and because it was never
20 raised as a claim of trial error at that point in the criminal proceedings, Defendant has legally waived
21 any right to collateral review of that claim by this Court. Rule 32.2(a)(3). Because of the evidence of
22 this failure, he is precluded from collateral review of this claim by Rule 32.2(a)(3). *Holquin*, 177
23 Ariz. at 592, 870 P.2d at 410.

24 (d) Claim 8.4—Failure to define deadly weapon.

25 Defendant did not raise this claim in his direct appeal brief to the Arizona Supreme Court. He
26 has therefore waived any right to collateral review in this Court. *Holquin*, 177 Ariz. at 592, 870 P.2d
27 at 410. Nor did the Supreme Court consider the issue *sua sponte* as fundamental error. *Schad*, 163
28 Ariz. at 423, 788 P.2d at 1174. It is clear that Defendant has never raised this claim on direct appeal.

1 Because of this failure, he is now precluded from collateral review of this claim by Rule 32.2(a)(3);
2 *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

3 (e) Claim 8.5–Right to be present at motion for mistrial.

4 The trial and appellate records make it clear that Defendant failed to raise this issue either at trial
5 or on direct appeal. Failure to object at trial constitutes a waiver of the issue on direct appeal.
6 *Eastlack*, 180 Ariz. at 258, 883 P.2d at 1014. Failure to raise the issue in the appellate brief on direct
7 appeal constitutes a waiver of that issue, as well as the Supreme Court’s failure to designate the claim
8 as fundamental error. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410. Because he has clearly waived this
9 claim in any previous court, Defendant is precluded from collateral review of Claim 8.5 by this Court
10 as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

11 (f) Claim 8.6–Exclusion of irrelevant evidence.

12 A review of the opening brief reflects no complaint with respect to the trial court’s ruling on the
13 admissibility of evidence of the victim’s mental health records. Nor does the Supreme Court’s opinion
14 discuss or provide relief on the claim as a matter of fundamental error. *Schad*, 163 Ariz. at 423, 788
15 P.2d at 1174. It is clear that Defendant did not raise this issue on direct appeal. Because the issue was
16 not raised on direct appeal, Defendant has waived this claim as a matter of law. *Holquin*, 177 Ariz.
17 at 592, 870 P.2d at 410. Waiver of the claim on direct appeal results in preclusion of any
18 consideration on collateral relief. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

19 (g) Claim 8.7–Sufficiency of the evidence.

20 A review of the opening brief reflects that Defendant did not raise this specific issue on direct
21 appeal. Nor did the Supreme Court address the sufficiency of the evidence as it pertained to the
22 conviction. (Although it did find the circumstantial evidence sufficient to support the aggravating
23 circumstance of pecuniary gain. See C(1)(a) above.) Otherwise, it is clear that Defendant did not raise
24 this specific issue on direct appeal. Because the issue was not raised on direct appeal, Defendant has
25 waived this claim as a matter of law. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410. Waiver of the claim
26 on direct appeal results in preclusion of any consideration on collateral relief. Rule 32.2(a)(3); *Wilson*,
27 179 Ariz. at 20, 875 P.2d at 1325. Claim 8.7 should be summarily dismissed.

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(h) Claim 8.8–Ineffective assistance of counsel.

This issue raises a proper subject for post-conviction review.

(i) Claim 8.9–Plea offer as a mitigating circumstance.

The burden of establishing mitigating circumstances is on the defendant to prove the fact by a preponderance of the evidence. *State v. Gallegos*, 178 Ariz. 1, 16, 870 P.2d 1097, 1112 (1994). In his opening brief, Defendant complained that the trial court never considered rehabilitation as a mitigating circumstance, and that the prior conviction was based on a pleasurable death. He did not attempt to prove in the trial court that the plea offered by the prosecutor constituted a mitigating circumstance. He did not, on appeal, argue that the trial court erred by not considering this as a mitigating circumstance. Nor did the Supreme Court find it to be a mitigating circumstance. 163 Ariz. at 421, 788 P.2d at 1172. (Although that court reviewed the mitigating circumstances, it did not even discuss this factor. See C(1)(a) above.) Failure to raise the claim in the trial court constitutes a waiver of the right to raise it on direct appeal and collateral relief. Rule 32.2 (a)(3). Failure to raise the claim on direct appeal constitutes a waiver of review on collateral review. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410. Defendant is precluded from review of this claim as a matter of law. Rule 32.2(a)(3): *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325. Claim 8.9 should be summarily dismissed.

(j) Claim 8.10–Child abuse as a mitigating circumstance.

In his opening brief, Defendant did not attempt to prove in the trial court that he had allegedly been abused as a child and that this fact constituted a mitigating circumstance. He did not, on appeal, argue that the trial court erred by not considering this as a mitigating circumstance. Nor did the Supreme Court find it to be a mitigating circumstance. 163 Ariz. at 421, 788 P.2d at 1172. (Although that court reviewed the mitigating circumstances, it did not even discuss this factor. See C(1)(a) above.) Failure to raise the claim in the trial court constitutes a waiver of the right to raise it on direct appeal and collateral relief. Rule 32.2 (a)(3). Failure to raise the claim on direct appeal constitutes a waiver of review on collateral review. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410. Defendant is precluded from review of this claim as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

1 (k) Claim 8.11—Consideration of mitigating circumstances by the state
2 supreme court.

3 Defendant raised this issue on direct appeal, and the Supreme Court considered it and rejected
4 it on the merits. *Schad*, 163 Ariz. at 421, 788 P.2d at 1172. Because this issue has been raised and
5 finally adjudicated on the merits on direct appeal, Defendant is precluded from review of this claim
6 as a matter of law. Rule 32.2(a)(2). (See C(1)(a) above.)

7 (l) Claim 8.12—Method of weighing mitigating circumstances.

8 Defendant did not raise the claim of method of weighing mitigating circumstances in either the
9 trial court or on direct appeal. Failure to raise the claim in the trial court constitutes a waiver of the
10 right to raise it on direct appeal and collateral relief. Rule 32.2 (a)(3). Failure to raise the claim on
11 direct appeal constitutes a waiver of review on collateral review. *Holquin*, 177 Ariz. at 592, 870 P.2d
12 at 410. Defendant is precluded from review of this claim as a matter of law. Rule 32.2(a)(3); *Wilson*,
13 179 Ariz. at 20, 875 P.2d at 1325.

14 Although Defendant never raised this issue in his opening brief on direct appeal, the record does
15 reflect that Defendant's present claim was addressed by the Supreme Court. Indeed, it stated that it
16 weighed each *aggravating* factor individually against "the mitigating circumstances." This strongly
17 suggests that that court balanced the individual aggravating circumstance against a combination of all
18 of the existing mitigating circumstances. Because this claim has been finally adjudicated on the merits,
19 Defendant is precluded from collateral review of this claim as a matter of law. Rule 32.2(a)(3).

20 (m) Claim 8.13—Behavior as a mitigating circumstance.

21 The Supreme Court finally adjudicated the issue of Defendant's behavior in prison as a
22 mitigating circumstance. 163 Ariz. at 421, 788 P.2d at 1172 ("Although the defendant has continued
23 to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to
24 call for leniency.") Because this claim has been finally adjudicated on the merits, Defendant is
25 precluded from collateral review of this claim as a matter of law. Rule 32.2(a)(3).

26 (n) Claim 8.14—Proportionality review.

27 As noted in C(1)(a) above, the Supreme Court finally adjudicated this issue on direct appeal.
28 *Schad*, 163 Ariz. at 422–23, 788 P.2d at 1173–74. That court found both that capital punishment is

1 not arbitrarily, capriciously and freakishly imposed, and applied the proportionality review that it
2 adhered to at that time. Defendant is therefore precluded from collateral review by Rule 32.2(a)(2)
3 as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

4 (o) Claim 8.15--Jury determination of sentencing facts.

5 The Supreme Court finally adjudicated this issue on direct appeal *Schad*, 163 Ariz. at 422, 788
6 P.2d at 1173. That Court rejected Defendant's claim that the sentencing statute denies him a right to
7 jury trial on the sentencing facts. Defendant is therefore precluded from collateral review by Rule
8 32.2(a)(2) as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

9 (p) Claim 8.16--Multiple instances of manifest error.

10 Defendant never raised this claim in the trial court. Failure to raise the claim in the trial court
11 constitutes a waiver of the right to raise it on both direct appeal and collateral relief. Rule 32.2 (a)(3).
12 Defendant never raised this claim on direct appeal. Failure to raise the claim on direct appeal
13 constitutes a waiver of any right to have this claim reviewed on collateral review. *Holquin*, 177 Ariz.
14 at 592, 870 P.2d at 410. Because he has waived this issue, Defendant is precluded from review of this
15 claim as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

16 (q) Claim 8.17--Cumulative error.

17 Defendant never raised this claim in the trial court. Failure to raise the claim in the trial court
18 constitutes a waiver of the right to raise it on both direct appeal and collateral relief. Rule 32.2 (a)(3).
19 Defendant never raised this claim on direct appeal. Failure to raise the claim on direct appeal
20 constitutes a waiver of any right to have this claim reviewed on collateral review. *Holquin*, 177 Ariz.
21 at 592, 870 P.2d at 410. Because he has waived this issue, Defendant is precluded from review of this
22 claim as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

23 (r) Claim 8.18--Ineffective assistance of appellate counsel.

24 Although Defendant alleges ineffective assistance of counsel, he does not specify either the
25 nature or the scope of deficient performance, much less describe the alleged prejudice. This is just
26 another cumulative error argument that is precluded. (See (q) above.)

27 With respect to the Supplemental Petition, the following claims are subject to preclusion under
28 Rule 32.2:

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(s) Claim No. 1- Agency status of Mr. Duncan.

On direct appeal from his first conviction, and likewise on direct appeal from his second conviction, Defendant challenged the trial court's findings that Mr. Duncan was not acting as an agent of the State when he visited Defendant in jail in Salt Lake City. In both instances, the Supreme Court held that there was no evidence to support a finding of agency. *Schad*, 129 Ariz. at 566, 633 P.2d at 375; *Schad*, 163 Ariz. at 414-15, 788 P.2d at 1165-66. Consequently, this claim has been finally adjudicated on the merits on appeal. According to Rule 32.2(a)(2), claims finally adjudicated on appeal are precluded from post-conviction relief as a matter of law. *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325. Claim No. 1 should be summarily dismissed in accordance with this authority.

(t) Claim No. 2-Newly discovered mitigation evidence.

The evidence that Defendant claims is "newly discovered" existed at the time of both the first and the second sentencing hearings. It was never raised by the defendant at either of those proceedings. Failure to raise the claim in the trial court constitutes a waiver of the right to raise it on both direct appeal and on collateral relief. Rule 32.2 (a)(3). Defendant never raised this claim on direct appeal. Failure to raise the claim on direct appeal constitutes a waiver of any right to have this claim reviewed on collateral review. *Holquin*, 177 Ariz. at 592, 870 P.2d at 410. Because he has waived this issue, Defendant is precluded from review of this claim as a matter of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

(u) Claim No. 3-Ineffective assistance of counsel.

Normally, the claim of ineffective assistance of counsel is reviewable on post-conviction relief. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). However, to justify review, the burden is on the defendant to raise a colorable claim. *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325. Failure to do so results in summary dismissal of that claim. *Id.* Because Defendant fails to state a colorable claim. This claim is subject to summary dismissal.

(v) Claim No. 4-Prosecutor misconduct.

This claim existed at the time of both the first and the second trials. It was never raised by the defendant at either of those proceedings. Failure to raise the claim in the trial court constitutes a waiver of the right to raise it on both direct appeal and on collateral relief. Rule 32.2 (a)(3). Defendant

1 never raised this claim on direct appeal. Failure to raise the claim on direct appeal constitutes a waiver
2 of any right to have this claim reviewed on collateral review. *Holquin*, 177 Ariz. at 592, 870 P.2d
3 at 410. Because he has waived this issue, Defendant is precluded from review of this claim as a matter
4 of law. Rule 32.2(a)(3); *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325. Claim 8.16 should be summarily
5 dismissed.

6 D. CONCLUSION.

7 Post conviction relief is not intended to replace direct appeal, nor is it the primary method of
8 review of a conviction. *State v. Aguilar*, 170 Ariz. 292, 294, 823 P.2d 1300, 1302 (Ct. App. 1991).
9 Consequently, this Court is not required to sit as a super-appellate judge to review issues that either
10 were raised and decided by the appeals court, or issues that existed at the time of trial or direct appeal
11 and could or should have been raised in that forum. That is why Rule 32.2 of the Arizona Rules of
12 Criminal Procedure requires this Court to dismiss any claim that is precluded as that term is defined.

13 In this case, Defendant is precluded from relief on all claims set forth in the preliminary petition
14 with the possible exception of Claim 8.8, and all claims in the supplemental petition with the possible
15 exception of number 3, both of which raise claims of ineffective assistance of counsel. The other
16 claims in both petitions either have been finally adjudicated on the merits on appeal or in a previous
17 collateral proceeding, or have been waived at trial, on appeal, or in any previous collateral proceeding.
18 As a matter of law, this Court should summarily dismiss these claims and enter a judgment for the
19 Plaintiff. *Wilson*, 179 Ariz. at 20, 875 P.2d at 1325.

20 In the event that this Court does not summarily dismiss each of the claims in the two petitions,
21 Appellee requests 30 days within which to address the merits of the remaining claims. A prospective
22 order is attached for the Court's convenience.

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RESPECTFULLY SUBMITTED this 25th day of December, 1995.

GRANT WOODS
ATTORNEY GENERAL

R. Wayne Ford
R. WAYNE FORD
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPEALS SECTION

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COPY of the foregoing was deposited
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