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RHONDA L. REPP
ATTORNEY AT LAW
220 W. GOODWIN, SUITE B
PRESCOTT, ARIZONA 86303-4706
TELEPHONE: (520) 778-5411
FAX (520) 778-0034
State Bar Number 004338

Attorney for Defendant

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

STATE OF ARIZONA,)
)
Plaintiff-Respondent)
)
vs.)
)
EDWARD HAROLD SCHAD, JR.,)
)
Defendant-Petitioner)

No. CR 8752
Division 1
MOTION FOR REHEARING

Petitioner has presented new evidence establishing a prima facie case that he is innocent of the crime for which he was convicted and sentenced to death, that he was tried and sentenced on false testimony of an agent who was working for the State, that mitigating evidence available, but not presented, at his sentencing hearing would have resulted in a life sentence, that his death sentence rests on invalid "prior" convictions, and that the State may have withheld material exculpatory and impeachment evidence from defense counsel.

Rather than hold an evidentiary hearing on these claims at which this Court could hear and evaluate Defendant's claims, this Court has summarily dismissed the petition. It did so based upon assumptions which a full and fair hearing would contradict.

Based upon these material facts, which neither the State nor this

1 Court in its summary order, have controverted, this Court should reconsider its
2 conclusion that certain claims raised by Defendant are precluded, and that
3 mitigation evidence and impeachment evidence recently found, which was never
4 previously investigated, is immaterial. At the very least, it should order an
5 evidentiary hearing regarding the newly-discovered evidence.

6 Although preclusion is inferred by the failure to raise the claim in
7 earlier proceedings, this inference is rebuttable. To rebut the inference of waiver,
8 it must be shown that the Petitioner:

9
10 1) was aware of the necessity of raising the particular claim on
11 his appeal,

12 2) chose not to raise the claim, and

13 3) that he understood the effect of this choice.

14
15 State v. Carriger, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984). ("To support a
16 finding of waiver under former subsection (c) [of Rule 32.2], the record must
17 indicate that Petitioner was aware of the necessity of raising in his appeal, the
18 claim he now presents and that he knowingly, voluntarily and intentionally waived
19 his right to present the claim"); State v. Corrales, 136 Ariz. 583, 595, 676 P.2d
20 615, 627 (1983) (where claim simply "did not enter [petitioner's] mind", it was not
21 waived); State v. Coleman, 152 Ariz. 583, 585, 733 P.2d 1166, 1169 (App.1987)
22 (where petitioner not aware of facts required to make out claim or of legal
23 significance of those facts, claim not waived); see also, Johnson v. Lewis, 929
24 F.2d 460, 464 (9th Cir. 1991) (under Arizona law, habeas petitioner was not barred
25 from seeking state postconviction review of his unexhausted federal constitutional
26 claims because "[t]he record in this matter does not indicate that [petitioner]

1 knowingly, voluntarily, and intelligently waived his right to present his federal
2 constitutional claim").

3 The Court in its June 21 Order states that "defense counsel's
4 decision to leave out potential issues was a strategic decision". There is no
5 support in the record for this assumption, nor is there anything in the record from
6 which the Court could conclude that the Defendant knew about and concurred in
7 this "strategic" decision. No waiver can be established in the absence of a record
8 to support such conclusions by the Court. Prevailing standards for effective
9 representation in criminal cases, and particularly death penalty cases, require that
10 all issues be raised early and completely. With the ever expanding waiver and
11 preclusion concepts, competent counsel are required to raise all colorable claims.
12 Counsel did not do so in this case, and his representation was, therefore, deficient.

13
14 Further, to fail to investigate completely a Defendant's background,
15 and to fail to locate witnesses such as Sharon Sprayberry, indicates that counsel
16 either failed himself to appreciate the import of such information or failed to care.
17

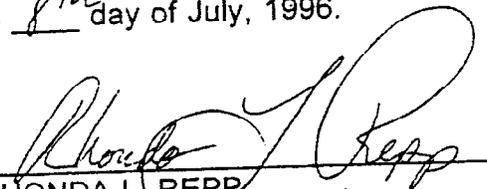
18 Rule 32.6(c) permits summary disposition only if no purpose would be
19 served by any further proceedings. Such conclusion cannot be reached here while
20 counsel continues to uncover and investigate matters which prior counsel failed to
21 uncover.
22

23 Moreover, in a capital case there is heightened need for reliability and
24 therefore a higher standard to which the Court must be held, pursuant to the
25 Defendant's right to due process and a fair and reliable sentencing determination.
26 See, e.g., Johnson v. Mississippi, 486 U.S. 578 (1988); Gardner v. Florida, 430 U.S.
349 (1977). The Eighth and Fourteenth Amendment mandate that all fact finding

1 procedures in capital cases meet this higher standard, regardless of whether they
2 are pre- or post-conviction. Ford v. Wainwright, 477 U.S. 399, 411-12 (1986). It is
3 the Court that is entrusted with the responsibility of finding facts and drawing
4 conclusions of the law. The Court must exercise that responsibility by providing
5 facts that enable the Appellate Court to determine why the post-conviction Court
6 found the facts to be as they are.

7 For all the above-stated reasons, it is hereby respectfully requested
8 that this Motion For Rehearing be granted and that an evidentiary hearing be
9 conducted on the issues raised in Defendant's Petition.

10
11 RESPECTFULLY SUBMITTED this 8th day of July, 1996.

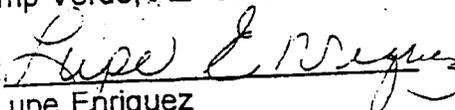
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RHONDA L. REPP
Attorney for Defendant/Petitioner

15 COPIES of the foregoing mailed
16 this 8th day of July, 1996, to:

17 Edward H. Schad, Jr.
18 #40496
19 ASP Florence
20 P.O. Box 8600
21 Florence, AZ 85232

22 R. Wayne Ford
23 Assistant Attorney General
24 Criminal Appeals Section
25 1275 W. Washington
26 Phoenix, AZ 85007

Honorable Richard Anderson
Judge of the Superior Court
Division 1
Camp Verde, AZ 86322

By: 
Lupe Enriquez