

**ATTACHMENT TO THE STATE'S OPPOSITION  
TO PETITION FOR REVIEW**

***State v. Schad***

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JUN 26 1996

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

DIVISION ONE

HON. RICHARD ANDERSON

CASE NO. CR-8752

NORBERT G. WEDEPOHL, CLERK

BY: S. CALKINS

DATE: June 21, 1996

TITLE:

STATE OF ARIZONA,

(Plaintiff)

vs.

EDWARD H. SCHAD, JR.

(Defendant

COUNSEL

R. Wayne Ford, Asst.  
Atty. General

(For Plaintiffs)

Rhonda L. Repp,

(For Defendant.)

HEARING ON:

NATURE OF PROCEEDINGS

COURT REPORTER

On March 27, 1996, the court entered an order dismissing most of the claims in this post-conviction relief proceeding and instructing counsel to brief the court on the three remaining claims: Claims 8.8 and 8.18 of the Preliminary Petition for Post-Conviction Relief and Claim 3 in the Supplemental statement of grounds for relief.

The court has now reviewed the supplemental pleadings filed by the defendant on May 23, 1996 and June 6, 1996, as well as the State's Supplemental Response and the defendant's Reply to the Supplemental Response. The court finds that no material issue of fact or law exists which would entitle the defendant to relief under Rule 32 of the Arizona Rules of Criminal Procedure. The petition is dismissed.

In Claim 8.8 of the Preliminary Petition counsel once again argues that Dr. Otto Bendheim should have been appointed to perform a psychological autopsy on the victim of this murder. Counsel now advances the theory that it was ineffective assistance of counsel to fail to move the court for reconsideration of its order denying this request and to fail to introduce the victim's mental health records. This court cannot imagine what would have been accomplished (after full briefing and oral argument) to move for reconsideration. This court would not have reconsidered that ruling and is not reconsidering it now. The defendant has not pointed out how introduction of the psychological records would have swayed the court's judgment because of defendant is

EXHIBIT B

unable to do so. There is no allegation that newly discovered evidence is now available to cause the court to reconsider what this court considers to be an imminently correct decision. Quite simply put, defense counsel is under no obligation to file frivolous pleadings and this is precisely what the defendant is suggesting that counsel should have done. The claim has no merit.

In Claim 8.18 of the Preliminary Petition the defendant complains that appellate counsel was ineffective for failing to raise some 17 issues on appeal in addition to the issues that were briefed and argued. It is obvious from the record in this case that defense counsel's decision to leave out numerous potential issues was a strategic decision. Good appellate advocacy demands that lawyers make these kinds of decisions so that their primary arguments are not lost in the forest of a shot gun approach. This mere allegation that it was some how ineffective assistance of counsel to make this particular strategic decision, with which present counsel seems to disagree, presents no showing whatsoever that the professional work of appellate counsel falls below the requisite standard of performance nor that in any way would a different approach have changed the outcome. The claim has no merit.

In issue #3(a) of the Supplemental Petition, the defendant alleges that trial counsel was ineffective for failing to locate and present to court and jury the testimony of Sharon Sprayberry, the former wife of John Duncan, who did testify at the trial. There is also an apparent issue of newly discovered evidence with respect to the testimony of Sharon Sprayberry. Certainly Mrs. Sprayberry's availability is not newly discovered; her whereabouts were known by the defense at the time of the trial. The trial court concluded twice and the Arizona Supreme Court concluded twice that Duncan was not operating as a police agent. Defendant now contends that his former wife would offer impeachment evidence with respect to that issue. Indeed this court ruled as a matter of law that Duncan was not a police agent. The proposed testimony of Sharon Sprayberry is certainly not new-it is merely cumulative impeachment and it is, therefore, not even particularly material. Even if the testimony of Sharon Sprayberry as presented in affidavit form in this proceeding were accepted as true, this court cannot imagine how the outcome of this trial would have been changed by offering this rather limited impeachment testimony in the face of the overwhelming proof of the defendant's guilt from a variety of sources. The claim has no merit.

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 now 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.

cc: Victim Witness Program