ARIZONA SUPREME COURT

STATE OF ARIZONA, Plaintiff-Respondent, v. EDWARD HAROLD SCHAD, Defendant-Petitioner.	CR-13-0058-PC Yavapai County Superior Court No. P1300CR8752 **Capital Case**

THE STATE OF ARIZONA'S OPPOSITION TO THE PETITION FOR REVIEW AND THE MOTION TO RECALL THE MANDATE

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I. ISSUES PRESENTED FOR REVIEW.

1. Whether the trial court abused its discretion by summarily dismissing Schad's successive petition for post-conviction relief?
2. Does Schad show extraordinary circumstances for this Court to recall the mandate it issued in 1991?

II. FACTS OF CRIME AND HISTORY OF THE CASE.

A. *Facts of the murder.*

Schad murdered the victim, Lorimer Grove, a 74-year-old resident of Bisbee, Arizona, who was driving his new Cadillac and a trailer to visit his sister in Everett, Washington. *See Schad v. Ryan*, 671 F.3d 708, 711 (9th Cir. 2011). After killing Mr. Grove, Schad traveled across the country in Grove's Cadillac, using Grove's credit cards and checks to finance the expedition. (*Id.* at 712.) He was arrested by Salt Lake City, Utah, police on September 8, 1978. (*Id.*) The medical examiner determined that the victim's cause of death was ligature strangulation, accomplished by means of a sash-like cord that was still knotted around the victim's neck when the body was found. (*Id.* at 711-712.) Schad had previously been convicted of second-degree murder in Utah in 1968. (*Id.* at 720.)

B. *Procedural history.*

1. Prior state court proceedings.

This Court reviewed Schad's case three times on direct appeal. *State v. Schad*, 129 Ariz. 557 (1981); *State v. Schad*, 142 Ariz. 619 (1984); *State v. Schad*, 163 Ariz. 411 (1989). After the last opinion from this Court affirming Schad's

conviction and sentence, the United States Supreme Court accepted certiorari review, but denied relief. *See Schad v. Arizona*, 501 U.S. 624 (1991).

Schad filed a preliminary state petition for post-conviction relief (PCR), which was followed by a supplemental petition for post-conviction relief. (PE[1] C, F.) One of the claims raised in the supplemental petition was ineffective assistance of counsel (IAC) at sentencing. (PE-F, at 348.) The state PCR proceedings were aptly summarized by Ninth Circuit Judge Rymer in her dissent from Ninth Circuit's second amended opinion on federal habeas review:

> After a trip to the United States Supreme Court, Schad filed a post-conviction petition in state court on December 16, 1991. John Williams took over as counsel after the petition was filed, and was ordered to file a supplemental petition by February 18, 1992. That deadline was extended five times (February 14, March 18, April 17, August 6, and October 14, 1992). On November 3, 1992, Williams was replaced by Michael Chezem. Chezem *successfully* sought appointment of an investigator and funds (July 30, 1993), and also obtained twelve extensions (January 5, 1993, February 2, April 14, May 14, June 28, July 30, August 19, September 27, October 25, November 29, December 27, 1993, and February 1, 1994). On January 31, 1994, Chezem withdrew and was succeeded by Rhonda Repp. *She obtained authorization for further investigative services in February 1994; on March 28, 1995, she asked for the services of a mitigation expert, which the court approved on July 6, 1995.* Meanwhile, she asked for and received a series of extensions on the ground that she and the investigator had not completed their investigation and located all potential witnesses (February 16, 1994, March 18, April 22, May 24, June 23, July 22, August 30, September 27, October 31, November 21, December 28, 1994, January 18, 1995,

[1] The State will refer to Petitioner's Exhibits with the preface "PE.)

> February 21, April 20, May 22, June 20, July 21, August 22, and September 20, 1995). On September 20, 1995 the court ruled that no further continuances would be granted. A supplemental post-conviction petition was filed on October 19, 1995, together with a request for an evidentiary hearing on the basis of "newly discovered evidence." The newly discovered evidence consisted of an affidavit by the mitigation expert, Holly Wake, expressing her opinion that the presentence report failed adequately to address the seriousness of Schad's abuse; *it contained no new facts and identified no witnesses.*

Schad v. Ryan, 606 F.3d 1022, 1050 (9th Cir. 2010), *amended by Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). The state PCR court denied the claim as follows:

> [D]efendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist. If the mitigation 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 affect sentencing. The claim has not [sic] merit.

(Respondent's Attachment at p.2.) This Court summarily denied review on September 19, 1997. (PE-L.)

2. Federal district court proceedings.

Schad filed his federal habeas petition in 1998, raising nearly 30 claims. On September 28, 2006, the district court issued its memorandum of decision and order denying habeas relief. *See Schad v. Schriro*, 454 F.Supp.2d 897 (D. Ariz. 2006). Regarding Schad's claim of ineffective assistance at sentencing (Claim P), the district court denied Schad's motion for an evidentiary hearing to develop new

mitigating evidence to support his claim, finding Schad had not been diligent in developing such evidence during his state post-conviction proceedings. *Id.* at 940. It then concluded that the state trial court's denial of the IAC-sentencing claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*. *Id.*

It alternatively addressed the claim on the merits in light of new evidence first presented in federal habeas proceedings, and concluded that "even if Petitioner had been diligent and the new materials were properly before the Court, Claim P [IAC-sentencing claim] is without merit." *Id.* It found that the new evidence did not demonstrate that trial counsel's performance at sentencing was either deficient or prejudicial. *Id.* It found the new evidence is "either cumulative or, as discussed above, contradictory to the portrait of Petitioner that trial counsel presented at sentencing." *Id.* at 944.

3. Ninth Circuit proceedings.

The Ninth Circuit panel's second amended opinion unanimously upheld the district court's ruling denying habeas relief on claims related to Schad's conviction, but remanded to the district court for further proceedings on the IAC-sentencing claim. *Schad*, 606 F.3d at 1032. Judge Rymer filed a lengthy opinion dissenting from that part of the majority panel opinion. *Id.* at 1048-1058.

The Supreme Court granted certiorari, vacated the Ninth Circuit's second

amended panel opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). *See Ryan v. Schad*, 131 S. Ct. 2092 (2011).

After further briefing and consideration regarding the application of *Pinholster*, the panel issued a third amended opinion that affirmed the district court's denial of relief on the IAC sentencing claim. *See Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). It stated:

> The state habeas court ruled that Schad's claim of ineffective assistance of counsel at sentencing lacked merit because he was unable to present any significant mitigating evidence. Although Schad sought to present such evidence in the district court, the Supreme Court has now ruled that when a state court has decided an issue on the merits, the federal courts may not consider additional evidence. *Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). It has vacated and remanded this case to us for reconsideration. *Ryan v. Schad*, —— U.S. ——, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). Accordingly the district court's denial of this claim must be affirmed.

671 F.3d at 722.

4. Supreme Court-petition for certiorari.

Schad filed a petition for writ of certiorari from the Ninth Circuit's third amended opinion; that petition was denied on October 12, 2012. He then filed a petition for rehearing, which was denied on January 7, 2013.

5. Successive state PCR petition.

Schad filed his successive PCR petition on December 20, 2012, raising six

claims. (P. Ex. A.) The superior court summarily denied the petition on January 18, 2013. (PE-B.)

III. REASONS THIS COURT SHOULD DENY REVIEW.

A. *Law.*

The trial court's decision on a petition for post-conviction relief is reviewed for an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441 (1986).

Claims that were raised or could have been raised on direct appeal or in a prior PCR proceeding are precluded. Rule 32.2, Ariz. R. Crim. P. *See also State v. Shrum*, 220 Ariz. 115, ¶ 12 (2009). Pursuant to Rule 32.2(a)(3), "Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded." *See State v. Spreitz*, 202 Ariz. 1, 2 (2002) (citing *State v. Conner*, 163 Ariz. 97, 100 (1990)). If a petitioner has asserted IAC claims in a previous petition and asserts IAC claims in a later petition, the claims must be precluded *without examining the facts*. *Stewart v. Smith*, 202 Ariz. 446, ¶ 12 (2002).

In a successive PCR notice, the applicant is required to set forth "the reasons for not raising the claim in the previous petition or in a timely manner." Rule 32.2(b). The superior court reviews the petition and identifies all claims that are procedurally precluded under Rule 32.2. *See* Rule 32.6(c), Ariz. R. Crim. P. Regarding successive petitions, if the court concludes that the defendant has not set forth meritorious

reasons why the claims were not raised in a previous petition, the court can summarily deny relief on the claims. Rule 32.2(b). The superior court must summarily dismiss the Rule 32 petition if it finds "no remaining claim presents a material issue of fact or law which would entitle the defendant to relief and that no purpose would be served by any further proceeding." Rule 32.6(c). *See also State v. Curtis*, 185 Ariz. 112, 115 (App. 1995), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446 (2002).

Rule 32 does not provide a defendant with a second appeal; rather, it is a post-conviction remedy "designed to accommodate the *unusual* situation where justice ran its course and yet went awry." *State v. Carriger,* 143 Ariz. 142, 146 (1984) (emphasis added). There is *no* federal constitutional right to a state post-conviction proceeding. *Id*. at 145.

B. ***Argument.***

Because there has been no substantial change in the law or newly-discovered evidence affecting Schad's case, his successive PCR petition does not fall within either of the cited exceptions to preclusion. Schad's recently-filed successive PCR contains claims that either could have been presented in the prior appeal or PCR, or that were presented and decided in the prior appeal or PCR. The trial court did not abuse its discretion by summarily dismissing Schad's successive petition.

1. Issue A—Disproportionate Sentence.

Schad's first claim is that his death sentence is unconstitutionally

disproportionate because he has been a good prisoner and because he was offered a life sentence before trial if he pled guilty. (Pet. at 2-3.) The superior court denied relief on this claim (Claim 4 below), finding (1) it was precluded because the proportionality issue was raised and decided on appeal; (2) his new claim regarding the effect of a guilty plea offer was meritless. (PE-B at 6-7.)

The superior court correctly found the proportionality claim precluded, pursuant to Rule 32.2(a)(2), because this Court did a proportionality review on direct appeal, and found the death sentence proportional. *Schad*, 163 Ariz. at 422.

Schad argues his sentence is disproportionate because of his subsequent good behavior in prison. His good behavior while incarcerated was already considered at sentencing and on appeal. On appeal, this Court held that, although "the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency." *Schad*, 163 Ariz. at 421. His continued good behavior in prison does not change the sentencing calculus—indeed, Schad admits that his recently-filed affidavits (PE-S, PE-T) "echo the testimony that was presented at Schad's sentencing hearing." (Pet. at 5.) Furthermore, this Court has repeatedly stated that all prisoners are expected to behave in prison. *See, e.g., State v. Lehr*, 227 Ariz. 140, ¶ 78 (2011); *State v. Kiles*, 222 Ariz. 25, ¶ 89 (Ariz. 2009).

The superior court also properly found the new "guilty plea" theory was

meritless. Schad is not entitled to the benefit of any plea offer he did not take. Moreover, a defendant has no right to a plea offer. *Bordenkircher v. Hayes*, 434 U.S. 357, 363-364 (1978).

Furthermore, this Court has affirmed a death sentence when the State and the defendant originally entered into a plea agreement calling for life imprisonment, and the defendant then was sentenced to life, but was later allowed to withdraw from the agreement. *See State v. Hinchey*, 181 Ariz. 307, 309-313 (1995). This Court declined to do a proportionality review. *Id.* at 310. It further found that the original life sentence resulting from a plea agreement was not a mitigating circumstance. *Id.* at 315. *See also State v. Hill*, 174 Ariz. 313, 1329-1330 (1993) (fact that the State had offered the defendant a plea agreement did not warrant leniency). The United States Supreme Court has not held that the state offering a plea agreement to a life sentence prior to trial is relevant mitigation.

Finally, Schad urges this Court to reduce his sentence to life based on *State v. Richmond*, 180 Ariz. 573 (1994). However, that case was in a different procedural posture because a federal court contingently granted habeas relief; relief would be required unless this Court cured its constitutional error of failing to reweigh evidence after striking an aggravating circumstance. 180 Ariz. at 576. This Court conducted its "independent review," reweighed the aggravation and mitigation, and reduced Richmond's sentence to life. *Id.* at 578. Here, there is no

constitutional sentencing error, and so no basis for an independent review under *Richmond.* Moreover, this Court already conducted an independent review on direct appeal and found the death penalty appropriate in this case. *See Schad*, 163 Ariz. at 421.

2. Issue B—*Lackey* claim.

Schad's next claim is based on the time that he has served since the death penalty was imposed. Although he attempts to re-brand this claim as a double-jeopardy claim, that is not the legal claim he presented to the superior court. (PE-A, at 4.) Grounds not included in the PCR petition are deemed waived. *See State v. Mata*, 185 Ariz. 319, 332-333 (1996). At any rate, Schad did not receive a life sentence *and* a death sentence for the murder; he received only a death sentence that has yet to be carried out.

Schad's claim below was based on a Supreme Court justice's order concerning the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). The PCR court found this claim was procedurally barred and also did not raise a colorable claim. (PE-B, at 8-9.) That was not an abuse of discretion.

In *Lackey*, the United States Supreme Court declined to review an analogous claim, namely, that execution of a defendant after he spent many years on death row would constitute cruel and unusual punishment. 514 U.S. at 1045. So-called "*Lackey* claims" have found no support in the courts that have addressed them. *See*

Allen v. Ornoski, 435 F.3d 946, 958-60 (9th Cir. 2006) (surveying opinions, all rejecting asserted *Lackey* claims). This Court has similarly rejected *Lackey* claims. *See State v. Murdaugh*, 209 Ariz. 19, ¶¶ 30-31 (2004); *State v. Schackart*, 190 Ariz. 238, 249 (1997).

3. Issue C—Utah Prior Conviction.

Schad's next issue is that his death sentence was invalid because one of the aggravating circumstances was based on the Utah murder conviction that Schad claims was unconstitutionally imposed. (Pet. at 9-11.) The superior court rejected this claim as being precluded, and also found any error harmless. (PE-B, at 7-8.)

The superior court properly found the claim precluded pursuant to Rule 32.2(a)(2), because it was raised on direct appeal and rejected by this Court. *Schad*, 163 Ariz. at 417-418. Schad argued that Arizona law had been changed to make sodomy a misdemeanor, and he thus argued that the Utah conviction could not constitute a prior felony conviction. 163 Ariz. at 418. This Court made clear that the Utah matter was a crime, "[i]rrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy, . . ." *Id.* at 418-419. Thus, the Supreme Court's later opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), does not affect the validity of an aggravating circumstance based on the prior Utah conviction.

Furthermore, Schad cannot collaterally attack his Utah conviction in this

proceeding challenging his Arizona conviction and sentence. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403-04 (2001); *Daniels v. United States*, 532 U.S. 374, 382 (2001).

Finally, as found by the superior court, a successful attack on the aggravating circumstance would not affect the sentence. As noted by this Court on direct appeal, the trial court found that the total mitigation was not sufficiently substantial to overcome *any one* of the aggravating circumstances. 163 Ariz. at 417. Schad's successive PCR petition does not contest the pecuniary gain aggravating circumstance. This Court held that the evidence "strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case." *Id.* at 420-421. And the Ninth Circuit upheld Schad's death sentence based solely on the pecuniary gain aggravating circumstance, not even reaching Schad's challenges to any aggravating circumstance based on the Utah murder conviction. *Schad v. Ryan*, 671 F.3d at 725-726.

4. Issues D & E--Ineffective Assistance at Sentencing.

Finally, Schad alleges ineffective assistance of counsel at sentencing and also asks this Court to apply federal habeas law to create a new exception to preclusion under Rule 32. The superior court found this claim precluded, and rejected Schad's invitation to apply federal habeas law in Rule 32 proceedings. (PE-B, at 3-5.) It did not abuse its discretion.

This claim is precluded, pursuant to Rule 32.2(a)(2), because it was raised in the prior petition for post-conviction relief, and review was denied by this Court.[2] Rule 32.2(b) does not contain an exception for IAC claims not previously raised due to the ineffective assistance of PCR counsel. *See State v. Diaz*, 228 Ariz. 541, ¶¶ 7–8 (App. 2012).

> Two of the exceptions to preclusion listed in Rule 32.2(b) are when (1):
>
> There has been a *significant change* in the law that if determined to *apply* to defendant's case *would probably overturn the defendant's conviction or sentence*[.]

Ariz. R. Crim. P. 32.1(g) (emphasis added); and (2):

> Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence.

Ariz. R. Crim. P. 32.1(e). Neither exception applies to this case.

There is no significant change in federal constitutional law that would apply to Schad's case to overturn his murder conviction or the death sentence, particularly on collateral review. *See State v. Slemmer*, 170 Ariz. 174, 184 (1991). Schad does not ask this Court to recognize a constitutional right to effective assistance of counsel in PCR proceedings. But even if he did, the United States Supreme Court has repeatedly found that there is no right to effective assistance of

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[2] To any extent that Schad's petition could be seen as presenting a new and different claim of ineffective assistance at sentencing, the new claim would be barred pursuant to Rule 32.2(a)(3) for not having been raised in prior proceedings.

counsel in state PCR proceedings. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555–59 (1987). This Court has similarly declined to recognize a right to effective assistance of PCR counsel. *Mata*, 185 Ariz. at 333, n. 9; *State v. Krum*, 183 Ariz. 288, 291–92 (1995).

Because Schad cannot assert a federal constitutional right, he urges this court to create a new exception to Rule 32 preclusion by applying federal habeas law, specifically *Martinez*. There is no reason to create a new, vague exception to preclusion under Rule 32. *See Shrum*, 220 Ariz. at ¶ 13 ("Because the general rule of preclusion serves important societal interests, Rule 32 recognizes few exceptions."). Arizona has regularly and consistently applied its preclusion rules under Rule 32. *See Smith v. Stewart*, 241 F.3d 1191, 1195 n.2 (9th Cir.2001) ("We have held that Arizona's procedural default rule is regularly followed ["adequate"] in several cases.") (citations omitted), *reversed on other grounds*, *Stewart v. Smith*, 536 U.S. at 860; *Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir. 1998) (Rule 32.2(a)(3) regularly followed and adequate); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.1997) (same) *See also State v. Mata*, 185 Ariz. 319, 322–37, 916 P.2d 1035, 1048–53 (1996) (rules of preclusion and waiver strictly applied to capital petitioners in state PCR relief proceedings).

Martinez simply holds that in *federal habeas proceedings*, a federal habeas

court may consider a claim that the prisoner failed to present in state court, and that would normally be considered procedurally defaulted, if the prisoner establishes: (1) his state PCR counsel was constitutionally ineffective in failing to raise the claim in state court, and; (2) the underlying IAC-trial claim is "a substantial one." *Id.* at 1318. *Martinez* clarified that the federal habeas rules regarding cause to excuse a procedural default "reflect an equitable judgment." 132 S. Ct. at 1319. To introduce "equitable judgments" into Rule 32 analysis would create chaos. Arizona courts have narrowly interpreted the listed exceptions to preclusion under Rule 32 and should continue to do so.

Furthermore, the IAC claim fails on the merits, as found by the federal courts. The Ninth Circuit affirmed the judgment of the federal district court, which denied Schad's IAC claim on the merits. The Ninth Circuit itself did not apply *Martinez* to Schad's case.

Nor does Schad present newly discovered evidence, under the parameters of Rule 32, to avoid preclusion of the claim. Schad supports his IAC claim with information first proffered in federal habeas (PE-M through R) and two recently-procured declarations (PE-S and T.) But the new information does not qualify as newly discovered evidence that would allow him to bypass Arizona's preclusion rule. *See* Ariz. R. Crim. P. 32.1(e). To allow Schad to relitigate the same claim because he has garnered additional evidence would eviscerate this Court's

proscription against "piecemeal litigation" of Rule 32 claims. *See Smith*, 202 Ariz. at 450 (citing *Spreitz*).

Newly discovered facts cannot provide a basis for relief if the defendant did not exercise due diligence in securing the newly discovered facts. Ariz. R. Crim. P. 32.1(e)(2). None of the new information Schad has presented in this successive PCR establishes a basis for relief because Schad did not exercise diligence in gathering the information. *See* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if they could not have been discovered with due diligence before trial); *State v. Jeffers*, 135 Ariz. 404, 427 (1983) (evidence is not newly discovered where defendant knew of existence and identity of witnesses but made no effort to obtain witnesses' statements). Schad was aware of the conditions of his own childhood and his imprisonment and could have provided the additional information to sentencing, resentencing, or first PCR counsel.

Moreover, the new information is not material because it would not have "probably" changed the sentence. *See* Rule 32.1(e)(3). There was already substantial information presented at Schad's sentencing, and the new information would have been cumulative to that already presented. *See, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 130 S. Ct. 383, 387–89 (2000) (no prejudice from failure to present "humanizing" mitigating evidence that would have been cumulative to evidence presented); *Cox v. Ayers*, 613 F.3d 883, 899-901 (9th Cir. 2010) (no

prejudice from failure to present additional mitigating evidence where evidence was cumulative of penalty phase evidence); *Matylinsky v. Budge*, 577 F.3d 1083, 1096–97 (9th Cir. 2009) (where counsel presented humanizing evidence, petitioner could not show prejudice from failure to present additional, cumulative evidence); *Babbit v. Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998) (finding no reasonable probability of life sentence where evidence not presented would have been cumulative) (collecting cases).

IV. SCHAD HAS NOT SHOWN HE IS ENTITLED TO THE EXTRAORDINARY REMEDY OF THIS COURT RECALLING ITS MANDATE.

This Court should also deny Schad's request for the extraordinary remedy of recalling the mandate it issued on direct appeal in 1991**.** "Rule 32 does not destroy the basic principle of finality in criminal proceedings." *State v. McFord*, 132 Ariz. 132, 133 (App. 1982).

The United States Supreme Court has held that recall of a federal mandate may "be exercised only in extraordinary circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 548 (1998). The Court said: "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the

guilty, an interest shared by the State and the victims of crime alike." 523 U.S. at 556 (internal citations and quotation marks omitted). "Finality also enhances the quality of judging" by removing "the notion that all the shots will always be called by someone else." *Id*. at 555.

In *Thompson*, a Ninth Circuit panel issued its mandate after it had denied habeas corpus relief in a death penalty case. *Id.* at 541. The court denied Thompson's motion to recall the mandate, but later *sua sponte* recalled the mandate—just 2 days before Thompson's scheduled execution and 53 days after the mandate issued. *Id.* at 547–48. The Ninth Circuit justified the recall of the mandate by citing "procedural misunderstandings within the court" that prevented an *en banc* review before the mandate was issued. *Id.* at 548 (internal quotation marks and alteration omitted). These "misunderstandings" included a "mishandled law clerk transition in one judge's chambers and the failure of another judge to notice that the original panel had issued its opinion in the case." *Id*. The Ninth Circuit then granted Thompson habeas relief and vacated his death sentence. *Id*. at 549.

The United States Supreme Court reversed, holding that recalling the mandate was a "*grave abuse of discretion.*" *Id*. at 542, emphasis added. The Supreme Court stated:

> It would be the rarest of cases where the negligence of two judges in expressing their views is sufficient grounds to frustrate the interests of a State of some 32 million persons in enforcing a final judgment in its favor. Even if this were a case implicating no more than ordinary concerns of finality, we could have grave doubts about the actions taken by the Court of Appeals.

Id. at 552–53.

As in *Thompson*, this is not the rarest of cases where Schad should be permitted to frustrate the interests of the people of Arizona in enforcing a final judgment in their favor, 34 years after the murder. Although United States Supreme Court precedent is not controlling on this issue, Arizona courts look to its decisions because "procedural uniformity is a desirable and important objective." *U.S. West Comm. Inc. v. Arizona Dept. of Revenue*, 199 Ariz. 101, ¶ 10 (2000).

That aside, this Court long ago stated that a mandate may be recalled only "in an extraordinary situation," after "balancing the policy considerations." *Lindus v. Northern Ins. Co. of New York*, 103 Ariz. 160, 162 (1968). This Court considered Schad's direct appeal back in 1989, and issued its mandate after the Supreme Court's opinion in this case back in 1991, more than two decades ago. There has been no "fraud, imposition, or mistake of fact" here. *Lindus*, 103 Ariz. at 162. Schad's attempt to further supplement the already substantial mitigation presented at sentencing does not "outweigh the interest in bringing litigation to an end." *Id*.

V. CONCLUSION.

The superior court did not abuse its discretion by summarily dismissing Schad's successive PCR petition. This Court should deny Schad's petition for review.

RESPECTFULLY SUBMITTED this 22nd day of February, 2013.

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