

CAPITAL CASE: EXECUTION SET OCTOBER 9, 2013 at 10:00 A.M

No. 13-16895

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD

Appellant-Petitioner

v.

CHARLES RYAN, ET. AL

Appellee-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

EXCERPT OF RECORD

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD HAROLD SCHAD,)	CAPITAL CASE
)	
Petitioner,)	
	)	CIV-97-2577-PHX-ROS
vs.)	
	)	MOTION FOR RELIEF FROM
CHARLES RYAN, et al.,	)	JUDGMENT PURSUANT TO
	)	FED. R. CIV. P. 60(b)
Respondents.)	
)	

COMES NOW Petitioner, Edward Schad, and moves this Court pursuant to Article III of the United States Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C. § 2241, *et. seq.*, and Federal Rule of Civil Procedure 60(b)(6) to grant him relief from its judgment

(Doc. Nos. 121, 122 and 123)¹ denying his Petition for Habeas Corpus Relief because there has been a significant change in procedural law under which he is entitled to relief from judgment. *See Martinez v. Ryan*, 132 S.Ct. 1309 (2012); *Schad v. Ryan*, 2013 WL 791610 (9th Cir. Feb. 26 2013)(holding that the Supreme Court’s decision in *Martinez* applies to Schad’s substantial procedurally defaulted ineffective assistance of counsel at sentencing claim), vacated on other grounds, *Ryan v. Schad*, No. 12-1084 (June 2013)(petition for reh’g filed August 8, 2013 (Docket Sheet)); *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012)(*Martinez* announced a “remarkable” change in habeas procedural law); *Cook v. Ryan*, No. CV-97-00146-PHX-RCB, 2012 U.S. Dist. LEXIS 94363, 2012 WL 2798789, at *6 (D. Ariz. Jul. 9, 2012) (concluding that the nature of the change in law heralded by *Martinez* was a remarkable, albeit limited, development weighing slightly in favor of 60(b)(6) relief); *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012); *Barnett v. Roper*, ___ F.Supp.2d ___, 2013 WL 1721205 (E.D. Mo. Apr. 22, 2013); *Landrum v. Anderson*, No. 96-cv-006441, slip op. at 11 (W.D. Ohio Aug. 22, 2012).

¹ On September 28, 2006, this Court entered its judgment denying Mr. Schad habeas corpus relief and dismissing his habeas corpus petition. (Doc. No. 121). On the same date, the Court entered its Order RE: Certificate of Appealability granting a Certificate on Claims A (*Brady* Claim) and P (IAC at Sentencing Claim) of Mr. Schad’s Petition for a Writ of Habeas Corpus, but denying a Certificate and the opportunity for Mr. Schad to apply for one as to the remainder of his claims. (Doc. No.123). By issuing a COA this Court has already found that Schad’s underlying claim of IAC is substantial because, under *Martinez*, the test for substantiality is equivalent to the COA standard. *See Barnett, supra*.

MEMORANDUM IN SUPPORT OF MOTION

I. THE REMARKABLE CHANGE IN HABEAS LAW BROUGHT BY *MARTINEZ* IS EXTRAORDINARY AND JUSTIFIES RELIEF UNDER RULE 60.

For more than two decades, federal courts steadfastly applied the holding of *Coleman v. Thompson*, 501 U.S. 722 (1991), as precluding the defense of ineffective assistance of post-conviction counsel as cause for a procedural default in habeas cases. The United States Supreme Court decision in *Martinez v. Ryan*, creating an equitable defense of ineffective assistance of initial-review-collateral-relief counsel for ineffective-assistance-of-counsel claims, worked “a sea change in habeas law.” Br. Of Amici Curiae Utah and 24 Other States in Support of Respondent, *Trevino v. Thaler*, No. 11-10189, p.2 (Jan. 22, 2013)(Amici included Arizona). The Ninth Circuit found *Martinez* was a “remarkable” change in habeas procedural law in *Lopez, supra*. This Court echoed the holding in *Lopez*, in *Cook, supra*. Other courts have likewise found the change worked by *Martinez* to be extraordinary. *Barnett, supra; Landrum, supra*.

This Court, and Ed Schad, did not have the benefit of the Supreme Court’s decision in *Martinez* on initial submission. As *Martinez* is an intervening decision which makes clear that Schad has valid cause for the procedural default of his ineffective-assistance-of-sentencing-counsel claim as presented for the first time in

federal court, this Court should grant Schad's motion for relief from judgment, reopen his case and order further proceedings in light of *Martinez*.²

A. CLAIM P IN SCHAD'S PETITION FOR WRIT OF HABEAS CORPUS IS A NEW, PROCEDURALLY DEFAULTED CLAIM, SUBJECT TO FEDERAL REVIEW UNDER THE EQUITABLE RULE OF *MARTINEZ*

In reviewing Schad's motion, this Court has the benefit of the decision of the appellate court in this case, itself an extraordinary circumstance, which found that Schad's ineffective assistance of counsel claim (Claim P in the petition) is a new, unexhausted, procedurally defaulted claim: "We conclude that Schad's new factual allegations set forth a new or different claim that was procedurally defaulted and

²While it is not clear that a habeas petitioner is required to exhaust his *Martinez* argument in state court, it should be noted that Schad has presented his *Martinez* argument and new claim of ineffective assistance of counsel at sentencing in the state court which refused to consider them. The January 18, 2013 decision of the Yavapai County Superior Court found that the state court does not provide an avenue for post-conviction relief for Schad's procedurally defaulted claim. Attachment A. The Yavapai County Superior Court's decision makes clear that Arizona does not, and will not, recognize the right to effective assistance of initial-review-collateral-proceeding counsel, equitable or otherwise. January 18, 2013 Minute Entry, pp.4-5. The Arizona Supreme Court denied Schad's petition for review. Attachment B. As such, the Arizona courts have found Schad's newly developed ineffective-assistance-of-sentencing-counsel claim (the same one presented in federal habeas and at issue here) precluded under Arizona law. *Id.*, p. 4. It is clear that there is no available remedy for Schad to exhaust the merit of his procedurally defaulted claim, nor his equitable defense thereto, in state court. The only avenue for vindication of Ed Schad's substantial and meritorious claim of the denial of his Sixth, Eighth, and Fourteenth Amendment rights, lies with the federal courts under *Martinez*.

that is ‘substantial.’” (*Schad*, at *5). The Court also found that *Martinez* provided cause to excuse the procedural default. *Id.* The Court further found that *Schad*’s IAC at sentencing claim was substantial. *Id.* The Court concluded that *Schad* was entitled to further proceedings in this Court to prove his allegations under *Martinez* and his right to habeas relief based in his defaulted, but meritorious, *Strickland* claim. *Id.* The extraordinary circumstances of the Ninth Circuit’s opinion, coupled with the Supreme Court’s decision in *Martinez*, warrant relief under Rule 60(b)(6).

B. *CULLEN V. PINHOLSTER*, 131 S.C.T. 1388 (2011), DOES NOT APPLY

Respondent will, no doubt, argue that this Court did not originally rule that *Schad*’s claim was procedurally defaulted, but rather reached a decision on the merits of the narrow, different, and factually unsupported claim presented in state post-conviction. Respondent will also likely argue that *Cullen v. Pinholster*, controls this Court’s review. But the Ninth Circuit has already rejected that argument in this case. It wrote:

Although the district court did not find that *Schad*’s claim was procedurally defaulted, it was. A claim is procedurally defaulted “if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.” *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Thus, if *Schad*’s new claim was not exhausted, he has procedurally defaulted

that claim because Arizona prevents him from asserting a successive claim in state court. See *Beatty v. Stewart*, 303 F.3d 975, 987 (9th Cir.2002) (describing Arizona's procedural default rules). Our rules for exhaustion focus not only on the legal claim but also on the specific facts that support it. Thus, an ineffectiveness of counsel claim may be a “new claim,” and therefore unexhausted, if the “specific facts” it asserts were not presented to the state court and they give rise to a claim that is “so clearly distinct from the claims ... already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim.” *Valerio v. Crawford*, 306 F.3d 742, 768 (9th Cir. 2002) (quoting *Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972)). *Martinez* permits a federal court to hear an unexhausted, and, thus, procedurally defaulted, claim that was not presented to the state court due to post-conviction counsel's ineffectiveness.

Schad raised an ineffective assistance of sentencing counsel claim before the state court based on counsel's failure to investigate and present additional evidence regarding his tragic history of child abuse—a claim designed to elicit a “reasoned moral response” to Schad as a “uniquely individual human being.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citations and alterations omitted). ER 333–37, 343–49. The factual allegations he raised before the district court, however, amounted to a new and different claim: a claim that his counsel failed to investigate and present evidence of his mental illnesses as an adult—evidence that would have afforded an explanation of *why* he committed the crimes of which he was convicted. ER 459. The evidence Schad submitted in support of the new claim included a psychological report that addresses his “several major mental disorders” including, among others,: “Bipolar Disorder; Major Depression; ... Obsessive–Compulsive Disorder; Schizoaffective Disorder; ... Dissociative Disorders....” ER 540.

Schad's new evidence constitutes a new claim that is “so clearly distinct from the claims ... already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim.” *Valerio*, 306 F.3d at 768 (quoting *Humphrey*, 405 U.S. at 517 n.18). Because Schad did not present this claim in his original petition for post-conviction relief to the state court, **it is procedurally**

defaulted. If Schad meets the requirements of *Martinez*, however, he may well have established cause for that procedural default.

Schad, supra, at *5-6 (emphasis added). Thus, the panel correctly concluded that *Pinholster* does not apply to new claims. Although the Supreme Court has vacated the opinion of the Ninth Circuit, its decision did not criticize, or even mention, the *Martinez* arguments. Rather, the Supreme Court’s opinion was confined to an interpretation of appellate procedural rules. Its decision does not undermine the persuasiveness of the panel’s analysis on these key issues and this Court is not free to ignore the panel’s analysis.

C. THE NINTH CIRCUIT’S OPINION THAT SCHAD IS ENTITLED TO HABEAS REVIEW OF HIS PROCEDURALLY DEFAULTED IAC CLAIM IN LIGHT OF THE INTERVENING DECISION IN *MARTINEZ* IS WELL SUPPORTED BY THE LAW AND RECORD HERE.

1. *MARTINEZ V. RYAN*, 566 U.S. ___ (2012), IS AN INTERVENING DECISION OF THE UNITED STATES SUPREME COURT THAT **FOR THE FIRST TIME** ESTABLISHES CAUSE FOR PROCEDURAL DEFAULT BASED ON EQUITABLE PRINCIPLES, *VIZ.* INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

In *Martinez v. Ryan*, 566 U.S. ___ (2012), the Supreme Court acknowledged the right to counsel as “the foundation of our adversary system,” with the “right to the effective assistance of counsel at trial” being “a bedrock principle in our justice system.” *Id.* at ___ (slip op. at 9), 132 S.Ct. at 1317. An incarcerated inmate,

however, faces significant difficulties “vindicating a substantial ineffective-assistance-of-trial-counsel claim,” because “while confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” *Id.* at ___ (slip op. at 8, 9), 132 S.Ct. at 1317.

To properly raise and exhaust an ineffectiveness claim, a state inmate requires the “help of an adequate attorney” who has both an “understanding of trial strategy” and the ability to undertake the “investigative work” necessary to raise the claim. *Id.* at ___ (slip op. at 8), 132 S.Ct. at 1317. In other words: “To present a claim of ineffective assistance at trial in accordance with the State’s procedures . . . a prisoner likely needs an effective attorney.” *Id.* at ___ (slip op. at 9), 132 S.Ct. at 1317.

If, however, state post-conviction counsel fails to properly raise a claim that trial counsel was ineffective, “it is likely that no state court at any level will hear the prisoner’s [ineffectiveness] claim.” *Id.* at ___ (slip op. at 7), 132 S.Ct. at 1316. Were federal habeas review of such an ineffectiveness claim also barred, an inmate would receive *no* review of his foundational constitutional claim in any court: “No court will review the prisoner’s claims.” *Id.* In *Martinez*, the Supreme Court recognized the inequity in such a situation.

Thus, to ensure that fundamental claims of ineffective-assistance-of-counsel may actually be reviewed by *some* court, *Martinez* provides that a federal habeas court may review an otherwise procedurally defaulted ineffectiveness claim when the default resulted from the ineffectiveness of *post-conviction counsel*:

[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue).

Martinez, 566 U.S. at ___ (slip op. at 11), 132 S.Ct. at 1318-1319. Restated, *Martinez* provides that the ineffective assistance of post-conviction counsel *plus* a substantial ineffectiveness claim provide “cause” for an otherwise unexhausted, procedurally defaulted ineffectiveness claim:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-

review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at ___ (slip op. at 15), 132 S.Ct. at 1320. The Ninth Circuit correctly found that Ed Schad’s ineffective-assistance-of-trial-counsel claim fits precisely within the ambit of *Martinez*.

2. SCHAD CAN ESTABLISH “CAUSE” UNDER *MARTINEZ*: HE HAS A SUBSTANTIAL INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM THAT WAS PROCEDURALLY DEFAULTED IN INITIAL STATE POST-CONVICTION PROCEEDINGS BECAUSE OF THE INEFFECTIVENESS OF POST-CONVICTION COUNSEL

For purposes of applying *Martinez*, there are three operative questions: (1) Does Ed Schad have a substantial ineffectiveness claim? (2) Is that claim procedurally defaulted?, and (3) Was initial post-conviction counsel ineffective for failing to properly exhaust the claim? The answer to all three questions is a resounding “Yes,” which ultimately means that a relief under 60(b) is in order, so that Schad may establish “cause” for his defaulted ineffectiveness claim, secure full habeas review of that claim, and ultimately obtain habeas corpus relief.

a. AS THE NINTH CIRCUIT RECOGNIZED ON INITIAL SUBMISSION AND REEMPHASIZED IN ITS FEBRUARY, 2013 OPINION, ED SCHAD’S UNDERLYING INEFFECTIVENESS CLAIM IS SUBSTANTIAL

The test for substantiality under *Martinez* is whether the underlying claim has “some merit.” *Martinez*, 132 S. Ct. at 1318. The Court used the COA standard announced in *Miller-El v. Cockrell*, 537 U.S. 322 (2002) (“debatable among jurists of reason”) as an example of when a claim has demonstrated that it has “some merit.” *Martinez*, 132 S.Ct. at 1318-1319. Schad’s underlying claim easily meets this standard, particularly where this Court already found that the Schad’s claim is debatable among jurists of reason. Doc. 123, *Barnett*, at *35-36. As the Ninth Circuit explained on initial submission, Schad’s ineffective claim is a claim on which he may be entitled to relief. The Court wrote, in “the district court, Schad presented evidence that, we conclude, if it had been presented to the sentencing court, would have demonstrated at least some likelihood of altering the sentencing court’s evaluation of the aggravating and mitigating factors present in the case.” *Schad v. Ryan*, 606 F.3d 1022, 1044 (9th Cir. 2010). The Court discussed how Schad could have received a life sentence had counsel presented the significant mitigating evidence now presented in federal habeas:

The evidence showed how Schad’s childhood abuse affected his mental condition as an adult. Had the sentencing court seen this evidence, which was so much more powerful than the cursory discussion of Schad’s childhood contained in [Dr.] Bendhein’s testimony and the presentence report, it might well have been influenced to impose a more lenient sentence. There was ample evidence presented at sentencing to illustrate Schad’s intelligence, good character, many stable friendships, and church involvement, at

least while he was in prison. Although Schad had a prior Utah conviction for second-degree murder, that charge arose out of an accidental death. The missing link was what in his past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death. The extensive evidence of repressed childhood violent experiences could have supplied that link and mitigated his culpability for the crime.

Id. Given the Ninth Circuit’s prior opinion, Schad’s claim easily meets *Martinez*’s requirement “that the prisoner must demonstrate that the claim has some merit.”

Martinez, 566 U.S. at ___ (slip op. at 11), 132 S.Ct. at 1318-1319. The Court reiterated this finding in its most recent opinion, specifically ruling that Schad’s claim is substantial under *Martinez*. The factors, coupled with this Court’s previous finding that Schad’s claim was debatable among jurists of reason, Doc. 123, clearly establish that Schad’s claim meets the substantiality prong of *Martinez*. See *Barnett*, *supra*.

Indeed, Schad’s *Strickland* claim is supported by significant mitigating expert testimony, lay testimony, and documentation all of which was previously filed with this Court Docs 100, 115. Taken together, that evidence presents a compelling mitigating narrative that, had it been presented at sentencing, would have made a significant difference. Schad’s father (Ed, Sr.) was sent off to combat in World War II days after Ed’s birth in 1942, only to suffer horrific conditions as a prisoner of war in Stalag-17. Upon his return, Ed Sr. was a “changed man.” An

abusive alcoholic who suffered disabling anxiety and post-traumatic stress disorder, he was seriously mentally disturbed, and extremely abusive toward Ed, particularly so because Ed Sr. believed Ed was not actually his child. Even so, Ed Sr. suffered hallucinations, delusions, and paranoia throughout Ed's childhood and adolescence, and was later diagnosed with psychosis. This profoundly disturbed man, however, profoundly distorted Ed's development. And while Ed's alcoholic father was debilitated by serious mental illness, Ed's mother lacked the ability to properly care for him. She neglected Ed, and through neglect and/or denial, watched helplessly as Ed's infant sister died from illness, dehydration, and malnutrition. Ed's mother, too, was dependent upon substances, including narcotics. And the family lived in poverty.

Importantly, the sentencing judge never heard significant mitigating expert testimony such as that from Charles Sanislow, Ph.D., of the Yale University School of Medicine, that compellingly weaves together the tragedy and trauma of Ed Schad's life that so terribly damaged him, resulting in lifelong, ongoing mental disturbance. As Dr. Sanislow explains, from a very early age, Ed Schad suffered "severe stresses" that damaged him psychologically, placing him at high risk for mental illness and disturbance, and making him unable to cope with life:

The environment in which Ed Jr. was raised included many factors that placed him at high risk. Among these are: a physically disabled and psychologically damaged father by horrific war experiences; an uneducated, unskilled, fairly young mother burdened with full responsibility for several children, some of them quite ill, facing an uncertain future with a husband in a POW camp; isolation in a semi-rural area, with mother and children totally dependent on a mentally ill father for transportation; both parents with substance abuse problems which worsened over time; no medical care for the first five to nine years of the children's lives; economic poverty in a depressed area with obligations of assistance to extremely large extended families.

Attachment C, Declaration Of Charles A. Sanislow, Ph.D., ¶58, p. 28. Ed Sr.'s unpredictable violence and chaotic behavior and abuse stunted Ed's "ability to regulate his affect and his ability to respond to stressful situations which increased his developing mental illness." *Id.*, ¶85, p. 41. Ed's parents socially isolated Ed, and he became withdrawn, viewing himself with the same sense of contempt and uselessness showered upon him by his own parents. *Id.*, ¶¶104-105, pp. 49-50. Ongoing instability in the home led to continued chaos in Ed's life during adolescence, leading him into juvenile criminal activity. *Id.*, ¶¶109-112, pp. 51-52.

Having endured this horribly toxic and dangerous home environment, Ed simply could not overcome the chaos and trauma that damaged him and formed him in those early years. Thus, for example, at age twenty, when it looked as if Ed might succeed in the Army, he impulsively committed petty offenses which led to

his discharge from the service. Ed's life continued to be marked by mental instability – “impulsivity, agitation, restlessness, anxiety, manic behavior, disorganized thought processes.” *Id.*, ¶134, p. 62; *Id.* ¶¶131-150, pp. 59-72. This was not surprising, given the horrible and terrifying dysfunctional environment in which he was molded. This ultimately culminated with Schad being imprisoned in Utah in 1970, his being released in 1977, followed by mental deterioration, manic behavior, and his arrest for this murder. *Id.*, ¶¶172-193, pp. 80-90. All the while, mental health professionals noted that he suffered mental problems, including paranoia, depression, and obsessive-compulsive tendencies. *Id.*, ¶¶178-179, pp. 82-83.

As Dr. Sanislow emphasized, throughout his life, Ed Schad “exhibited many symptoms of a severe and chronic mental illness” traceable to the sheer chaos and insanity of his upbringing. *Id.*, ¶194, p. 90. As this Court has recognized, it is that link between the trauma and chaos of Ed's early life that very well could have resulted in a life sentence. *Schad*, 606 F.3d at 1044. That is precisely why Schad's claim is substantial: Had the mitigating narrative of Ed's life been presented at sentencing, as it could have been by a mental health professional like Dr. Sanislow, a life sentence was reasonably probable.

In fact, Schad's *Strickland* claim is similar to any number of *Strickland* claims from Arizona which have been found to be substantial and/or meritorious, given the very types of mitigating explanation presented in Schad's case. *See e.g., Stanley v. Schriro*, 598 F.3d 612 (9th Cir. 2010)(finding a *prima facie* case for relief under *Strickland* and remanding for further proceedings where counsel failed to present expert mitigating mental health evidence at sentencing); *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010)(counsel ineffective at sentencing for failing to present mitigating evidence of, *inter alia*, poverty, unstable and abusive upbringing including sexual abuse, and personality disorder); *Libberton v. Ryan*, 583 F.3d 1147 (9th Cir. 2009)(counsel ineffective at sentencing for failing to present mitigating evidence of serious childhood abuse and mental disturbance); *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (sentencing counsel ineffectively failed to investigate and present mitigating evidence of abusive childhood, mental condition, and drug dependency). *See also Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009).

It is not surprising then that the Ninth Circuit found that Ed Schad meets *Martinez's* substantiality requirement.

We conclude that Schad has shown that his claim is substantial because, as we previously held, "if [the new evidence] had been presented to the sentencing court, [it] would have demonstrated at least some likelihood of altering the sentencing court's evaluation of

the aggravating and mitigation factors present in this case.” *Schad v. Ryan*, 595 F.3d at 923 (subsequent history omitted). In fact, his claim is more than substantial. As we stated in Part II, *supra*, Schad's counsel's failure to investigate and present evidence of his serious mental illnesses “had substantial and injurious effect or influence in determining the [sentence].” *Brecht*. 507 U.S. at 623

Schad, at *6.

b. SCHAD’S SUBSTANTIAL
INEFFECTIVENESS CLAIM WAS
PROCEDURALLY DEFAULTED BY INITIAL
POST-CONVICTION COUNSEL

Schad’s substantial ineffectiveness-at-sentencing claim, however, was never properly presented to the state courts by initial post-conviction counsel. It is thus considered procedurally defaulted and ultimately subject to *Martinez*, where post-conviction counsel provided the state courts *none* of the mitigating evidence underlying Schad’s federal habeas claim.

i. EXHAUSTION REQUIRES PRESENTATION
OF BOTH THE FACTS AND LEGAL THEORY
IN SUPPORT OF A CLAIM

Before presenting a claim in federal habeas proceedings, a petitioner must exhaust state court remedies. 28 U.S.C. § 2254(b). Exhaustion requires a petitioner to present to the state court both the legal theory and the facts supporting a claim, so that the state court may have the first opportunity to apply the law to those facts. As the Supreme Court explained in *Gray v. Netherland*, 518 U.S. 152 (1996): “In *Picard v. Connor*, 404 U.S. 270 (1971), we held that, for purposes of

exhausting state remedies, a claim for relief in habeas corpus *must include* reference to a specific federal constitutional guarantee, as well as *a statement of the facts that entitle the petitioner to relief.*” *Gray*, 518 U.S. at 162-163 (emphasis supplied). *See also McCaskle v. Vela*, 464 U.S. 1053, 1055 (1984)(O’Connor, J., dissenting) (exhaustion requires presentation of “all facts necessary to support a claim” and identification of legal claim arising from those facts).

As the Ninth Circuit has likewise explained, to “fairly present” a federal claim to state court and avoid a procedural default, a federal habeas petitioner must:

describe both *the operative facts* and the federal legal theory on which his claim is based so that the state courts could have *a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.*

Castillo v. McFadden, 399 F.3d 993, 998 (9th Cir. 2004)(emphasis supplied); *See also Schad, supra.* “For purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts the entitle the petitioner to relief.” *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). *See also Carney v. Fabian*, 487 F.3d 1094 (8th Cir. 2007)(to exhaust state remedies, petitioner must fairly present the facts and substance of his claim to state court); *Longworth v. Ozmint*, 377 F.3d

437, 448 (4th Cir. 2004)(exhaustion requires that petitioner “fairly present to the state court both the operative facts and the controlling legal principles associated with each claim.”); *Wilson v. Briley*, 243 F.3d 325, 327-328 (7th Cir. 2001)(to fairly present claim, petitioner must “present both the operative facts and the legal principles that control each claim.”)

Respondent has previously acknowledged as much, having argued that unless facts in support of an ineffectiveness claim are actually presented to the state courts, the claim in federal court is not exhausted: “The problem with presenting to the federal court new evidence never presented to the state courts is that it places the claim in a significantly different evidentiary posture in federal court, violating the exhaustion requirement.” R. 116, p. 4 (Respondent’s Opposition To Motion To Expand Record).

ii. POST-CONVICTION COUNSEL FAILED TO PROPERLY EXHAUST SCHAD’S *STRICKLAND* CLAIM AS PRESENTED IN HABEAS

Under these standards, Schad’s ineffectiveness claim, as presented in Amended Petition ¶28, Claim P, is not exhausted and procedurally defaulted for purposes of *Martinez*. To be sure, while Schad did raise *a Strickland* claim in his initial state post-conviction proceedings, he did not raise *the Strickland* claim presented to the federal courts in Amended Petition ¶28, Claim P, as supported by

the vast evidence presented in federal habeas. Post-Conviction counsel simply did not present to the state court the operative facts and evidence underlying ¶28, Claim P.

As the Ninth Circuit previously concluded in its pre-*Martinez* opinion in this case: “The record is clear that Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings. *Schad*, 606 F.3d at 1044. Schad’s federal habeas claim is thus *not* the claim raised in state court, because, as this Court noted, it is based upon “a number of exhibits that contain information never presented to the state courts.” R. 121, p. 57 (Memorandum). In its most recent opinion, the Court clearly held that that the claim presented in federal court is a new, unexhausted claim. *Schad, supra*, at *5-6.

Indeed, in state court, post-conviction counsel presented no evidence (whether affidavits, declarations, or documents) to show that trial counsel was ineffective at sentencing. Even when asking for more time to represent Schad, post-conviction counsel did not present any documentary evidence or proposed testimony from any witness (lay or expert) to support a new sentencing hearing under *Strickland*. Counsel did provide an affidavit from investigator Holly Wake, but that affidavit merely identified corrections department records to be obtained,

while noting that family members also should be interviewed. To quote

Respondent, post-conviction counsel simply:

presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

R. 116, p. 7.

Respondent has repeatedly asserted that Schad's current *Strickland* claim was not fairly presented to the Arizona courts, especially where ¶28, Claim P, is based upon the comprehensive affidavit of Charles Sanislow that was never considered by the Arizona courts:

[A]llowing Petitioner to expand the record with the declaration at issue would place the claim in a significantly different evidentiary posture than it was in before the state court, thereby violating the fair presentation requirement. *See Nevius*, 852 F.2d at 470; *Aiken*, 841 F.2d at 883.

R. 116, p. 9. Schad's current claim in federal habeas, therefore, is quite clearly defaulted precisely because "Schad did not succeed in bringing out relevant mitigating evidence during state habeas proceedings." *Schad*, 606 F.3d at 1044.

Under virtually identical circumstances, the United States Court of Appeals for the Fourth Circuit found such a *Strickland* claim procedurally defaulted. *Moses*

v. Branker, 2007 U.S.App.Lexis 24750 (4th Cir. 2007). In *Moses*, the habeas petitioner claimed in state post-conviction proceedings that counsel was ineffective under *Strickland* based solely on allegations and proof that trial counsel should have called two additional witnesses at the capital sentencing proceeding, Dennis and Johnson. *Id.* *6. With *Moses* having presented that limited claim to the state court, the state court denied relief, concluding that trial counsel's performance with regard to those two witnesses was not deficient. *Id.*

In federal habeas proceedings, however, unburdened by ineffective state post-conviction counsel, *Moses* presented a very different claim – very much like *Schad*'s habeas claim – in which he presented abundant, new mitigating evidence showing the prejudice flowing from trial counsel's failures:

The claim in the federal petition is not limited, however, to counsel's failure to call Dennis and Johnson as mitigating witnesses. Instead, the federal petition asserts that counsel had 'conducted an inadequate investigation of Petitioner's childhood background and family circumstances' and 'consistently ignored important mitigation leads.' [citation omitted] The petition describes in detail the type of mitigating evidence that could have been presented if counsel had undertaken a full investigation of *Moses*'s background. Attached to the petition are affidavits from seventeen persons who would have offered mitigating testimony, including a caseworker and two psychologists from the Massachusetts Department of Youth Services, two teachers from *Moses*'s elementary school, and twelve family members, including Johnson. The petition asserted that testimony from these witnesses would have detailed the 'daily horror of *Moses*'s childhood home' while also portraying *Moses* as someone with 'a life worth preserving.'

Id. *7. Having made such a different presentation of mitigating evidence that should have been presented at sentencing, Moses had thus “fundamentally alter[ed] the ineffective assistance of counsel claim he presented to the state . . . court,” as his federal claim “required the presentation of a set of facts not introduced in the state . . . proceeding.” *Id.* *8.

The Fourth Circuit thus concluded “that the ineffectiveness claim in Moses’s [federal] petition was fundamentally different than the one presented to the state court,” and accordingly, “Moses failed to exhaust in state court the ineffective assistance of counsel claim now presented in his federal habeas petition.” *Id.* *8-9. His claim was therefore procedurally defaulted (and the court rejected his claim that the ineffectiveness of post-conviction counsel should be considered “cause” for his default). *Id.* *9.¹

The Arizona Superior Court’s recent order in *State v. Schad*, No. P1300CR8752, confirms this conclusion. During Schad’s initial post-conviction proceedings, post-conviction counsel did not present any of the evidence underlying Schad’s new *Strickland* claim as presented in federal habeas. In a

¹ The situation in both *Schad* and *Moses* is similar to that described in *Dickens v. Ryan*, 9th Cir. No. 08-99017, which is pending *en banc* review in the Ninth Court.

second Rule 32 motion filed in 2012, however, Schad did present all of that evidence, thus providing the state courts all the facts in support of his federal habeas claim as well as his legal theory.

Under Ariz.R.Crim.P. 32.2(a)(3), however, a claim is “precluded from relief . . . upon any ground . . . that has been waived . . . in any previous collateral proceeding.” “[W]ithout examining the facts,” the Yavapai County Superior Court thus found Schad’s current *Strickland* claim precluded from review, waived under Rule 32.2(a)(3). *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. In doing so, the Superior Court applied *Stewart v. Smith*, 202 Ariz. 446, 450 (2002), to conclude that given the mere fact that Schad raised a *Strickland* claim in his initial post-conviction proceedings, his new claim could not be heard. As the Arizona Supreme Court emphasized in *Smith*, the “ground of ineffective assistance of counsel cannot be raised repeatedly,” but Schad’s case “fits squarely within the parameters addressed in *Stewart*.” *State v. Schad*, No. P1300CR8752, In The Superior Court of Yavapai County, Jan. 18, 2013, p. 4. Having been barred by the recent order of the Yavapai Superior Court, Schad’s federal petition ¶28, Claim P, thus appears defaulted for this additional reason.

c. INITIAL POST-CONVICTION COUNSEL WAS INEFFECTIVE UNDER *MARTINEZ*

Under *Martinez*, therefore, the lone remaining question is whether initial post-conviction counsel was ineffective for failing to present the defaulted *Strickland* claim that Schad now presents in federal habeas. It certainly appears that way. In fact, Respondent has repeatedly emphasized that post-conviction counsel lacked diligence and unreasonably failed to present the mitigation claim now presented by Schad – because the mitigating evidence presented in federal court was readily available to post-conviction counsel. Respondent’s own position proves that Schad has made more than the minimal *prima facie* showing necessary for further proceedings under *Martinez*.

Indeed, the state has emphasized that post-conviction counsel didn’t present the state court any evidence in support of a *Strickland* claim “[d]espite extensive continuances and investigation.” R. 116, p. 5. To reiterate, Respondent has maintained that post-conviction counsel:

presented no names of potential witnesses, no description of their proposed testimony, no affidavit from anyone stating what that person would testify to at a hearing, and no argument why that information would probably have changed the sentencing hearing if it had been presented.

Id. at 7. Having laid the blame for this state of affairs at the feet of post-conviction counsel, Respondent had further acknowledged that post-conviction counsel’s

failures were unreasonable under the circumstances, thus meeting *Strickland*'s definition of ineffectiveness. As Respondent has argued to the Ninth Circuit

[Schad's counsel] did not make 'a reasonable attempt, in light of the information available at the time, to investigate and pursue' his claim of ineffective assistance of counsel.

Schad v. Ryan, 9th Cir. No. 07-99005, Respondents'-Appellees' Petition For Rehearing And Rehearing *En Banc*, R. 58-1, p. 3 (Sept. 23, 2009)(emphasis supplied). This is the very definition of ineffectiveness under *Strickland*. The Supreme Court explained in *Porter v. McCollum*, 558 U.S. 30, ___ (slip op. at 10), 130 S.Ct. 447, 453 (2009)(per curiam), counsel performs deficiently when she "ignore[s] pertinent avenues of investigation of which [s/]he should have been aware." *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (counsel ineffectively failed to conduct complete investigation of mitigating evidence).

This is precisely the error of state post-conviction counsel which a Missouri District Court found to constitute deficient performance under *Martinez* warranting relief under Rule 60(b). In *Barnett*, the state court found that the state post-conviction counsel violated Missouri rules of pleading and therefore denied the claim on procedural grounds. *Barnett*, 2013 U.S. Dist. LEXIS 57147, *38, note 17. Judge Weber of the United States District Court for the Eastern District of Missouri, accepted the findings of the state court that counsel's failure to brief was

the ground for procedural default and found such failure to be deficient performance. The errors and omissions of Schad's state post-conviction counsel here are even more egregious. Plainly, the record and the opinion of the Ninth Circuit in this matter establish post-conviction counsel's ineffectiveness.

3. SCHAD THUS STATES A *PRIMA FACIE* CASE FOR RELIEF UNDER *MARTINEZ*

All told, therefore, Ed Schad's case falls squarely within the scope of *Martinez*. As presented in federal court, Amended Petition ¶28, Claim P, is substantial, as this Court has already recognized. This claim was not presented to the Arizona courts and is thus unexhausted and procedurally defaulted under *Martinez*. Also, as Respondent has essentially conceded, counsel during initial post-conviction proceedings was ineffective for failing to present the claim, having failed to reasonably investigate and pursue the claim in light of evidence available at the time. *Martinez* applies with full force here.

D. APPLICATION OF THE *GONZALEZ/PHELPS* FACTORS WEIGH IN FAVOR OF SCHAD AND 60(b)(6) RELIEF

Rule 60(b) is a rule of equity. It is settled law that Rule 60(b)(6) provides a vehicle for a federal habeas petition to seek relief from a judgment where the continued enforcement of that judgment is contrary to law and public policy.

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any . . . reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in Rules 60(b)(1)-(5). *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n 11, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988); *Klapprott v. United States*, 335 U.S. 601, 613, 93 L. Ed. 266, 69 S. Ct. 384 (1949) (opinion of Black, J.).

Gonzalez v. Crosby, 545 U.S. 524, 528-529 (U.S. 2005) (internal footnotes omitted). The Court in *Gonzalez* held that when a habeas petitioner alleges a defect in the integrity of the federal habeas proceedings then such an attack is permitted under AEDPA. *Id.*, at 532. *Gonzalez* distinguished motions attacking the integrity of the federal court's resolution of procedural issues (there a statute of limitations issue) from motions alleging a defect in the substantive ruling on the merits of a claim or motions raising new claims for relief.

The Ninth Circuit has found that allegations similar to those raised here, are cognizable under Rule 60(b)(6). *See Lopez, supra*; *See Moormann v. Schriro*, 2012 WL 621885 at *2 (9th Cir. Feb. 28 2012)(finding petitioner's 60(b) motion properly and "diligent[ly]" brought, and claims fully exhausted). *See also, Barnett, supra*; *Landrum, supra*.

Applying *Gonzalez*, the Ninth Circuit has observed that,

The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish justice." Given that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."

Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009)(footnotes omitted)(quoting *Gonzalez*). *Phelps* identified a number of factors for courts to consider in deciding whether to grant relief from judgment under Rule 60(b)(6). The Court emphasized that these factors were merely provided for guidance and were not a checklist. Each case, the court cautioned, must be reviewed on a case-by-case basis.

[C]ourts applying Rule 60(b)(6) to petitions for habeas corpus have considered a number of factors in deciding whether a prior judgment should be set aside or altered. Most notably, the Supreme Court in *Gonzalez* and the Eleventh Circuit in *Ritter*, laid out specific factors that should guide courts in the exercise of their Rule 60(b)(6) discretion. In discussing these factors, **we do not suggest that they impose a rigid or exhaustive checklist**: "Rule 60(b)(6) is a grand reservoir of equitable power," *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (internal footnote and quotation marks omitted), and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez*, 545 U.S. at 542 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)). However, we have "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the] timeliness and finality" of judgments. *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008). Given these important and

potentially countervailing considerations, the exercise of a court's ample equitable power under Rule 60(b)(6) to reconsider its judgment "requires a showing of 'extraordinary circumstances.'" *Gonzalez*, 545 U.S. at 536.

Phelps v. Alameida, 569 F.3d 1120, 1135 (9th Cir. Cal. 2009)(emphasis added).

Each of the *Gonzalez/Phelps* factors are discussed seriatim and each weighs in favor of 60(b) relief here.

1. THE NATURE OF THE CHANGE IN LAW FAVORS 60(B) RELIEF

Martinez, holds, “as an equitable matter”: “A procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Id.*, Slip. Op. at 8, 15. The court explained that counsel in initial-review collateral proceedings who fail to perform consistent with prevailing professional norms and as a result of negligence, inadvertence, or ignorance fail to raise claims of ineffective assistance of trial counsel are themselves ineffective and the prisoner is excused from failing to raise such claims at an earlier time. This holding modified the Court’s holding in *Coleman v. Thompson*, 501 U.S. 722 (1991).

Martinez completely changed the legal landscape with respect to procedurally defaulted federal habeas claims of constitutionally ineffective

assistance of counsel. Prior to *Martinez*, if the cause of the default was ineffective assistance of post-conviction counsel, then the claim was procedurally barred from federal review. No more. The Ninth circuit, as well as courts in Ohio and Missouri, have characterized this change in the law as remarkable and as meeting prong one of *Gonzalez*. *Lopez, supra; Barnett, supra; Landrum, supra.*

The equitable concerns expressed in *Martinez* are manifest in this case. The Court wrote, “When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim.” *Id*, Slip Op. at 7. The Court observed further, “And if counsel’s errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner’s claims.” *Id*. Such a result, the Court concluded is inequitable.

That is exactly what happened here. As the Ninth Circuit observed, Petitioner deserves relief from this Court’s now erroneous judgment.

2. SCHAD HAS BEEN DILIGENT IN PURSUING RELIEF

Schad had diligently sought relief on his claim since first presenting it to this Court in his amended petition for habeas relief. He obtained a COA from this Court after the denial of relief, Doc. 123. He briefed the claim on appeal and won a remand. He defended his right to a remand in the United States Supreme Court. After the remand order was reversed in light of *Pinholster*, Schad continued to

press his claim. After the Ninth Circuit, feeling constrained by *Pinholster* denied relief, Schad sought rehearing *en banc*. After rehearing was denied, the Supreme Court's decision in *Martinez* was announced. Although there was no recognized procedural vehicle for bringing the matter to the Court's attention, Schad moved to reopen the appeal based on *Martinez*. Schad pressed his *Martinez* arguments to the United States Supreme Court. And then, within days of discovering that on motion by the Respondent, the Ninth Circuit was reconsidering its opinion in *Schad* because it conflicts with the decision in *Dickens v. Ryan*, Schad moved for further consideration in the Ninth Circuit. ALL of these actions took place while the mandate of the Ninth Circuit was stayed WITHOUT OBJECTION. Schad won relief under *Martinez* in the Ninth Circuit. The Supreme Court reversed that grant of relief based on a procedural rule. Schad timely sought rehearing of that decision. Rehearing remains pending and the mandate of the Ninth Circuit has not issued. Schad has been diligent.

3. THE PARTIES RELIANCE IN FINALITY OF THE JUDGMENT IS NOT A WEIGHTY FACTOR

Finality has not attached to this case. As of this filing, the mandate from the United States Supreme Court has not issued and the Ninth Circuit's stay of execution remains in place. The Ninth Circuit has not returned the record to this Court. While the State of Arizona has moved for a warrant of execution, which

Schad has opposed, they did so with the full knowledge that 28 U.S.C. § 2251 renders any action by the state court void. The fact that Respondent flouts the law in an unseemly rush to execute a man whose capital sentence is patently unreliable is not a factor that can weigh in his favor.

Schad is in an even better posture than the prisoner in *Barnett* where the Court granted 60(b) relief in a motion to reconsider filed pursuant to Rule 59. There the Court gave weight to the capital nature of the crime and the fact that the claim at issue, as here, went to the reliability of sentence. The Court wrote, “the death penalty is different and requires a greater need for reliability, consistency, and fairness.” *Barnett, supra*, at *55. Though calling it a “close call” the Court found that the State’s interest in finality was ~~where~~ outweighed by Barnett’s interest in review of his fundamental claim of constitutional error.

4. THERE HAS BEEN NO DELAY BETWEEN FINALITY OF JUDGMENT AND MOTION FOR RELIEF, THE JUDGMENT IS NOT YET FINAL.

As stated, Schad has not delayed. He timely sought rehearing from the United States Supreme Court *per curiam* opinion. His rehearing petition stayed the mandate of the Supreme Court and the Ninth Circuit. As such, there is no delay between finality and this motion as finality has not attached. Further, Schad has sought relief at every stage since the decision in *Martinez* was announced. It was

more appropriate to first bring the motion to the Court of Appeals who is vested with jurisdiction over the habeas petition.

Further, any interest in finality is diminished by the fact that this is a capital case and the error at issue goes to the heart of the reliability of Schad's sentence.

As Judge Weber wrote in *Barnett*:

[C]apital punishment jurisdiction cautions that the death penalty is different, and requires a greater need for reliability, consistency and fairness. See *Sheppard*, 2013 U.S. Dist. LEXIS 5565, 2013 WL 146342, at *12. Lessening any weight the capital nature of the action bestows, is the multiple layers of review that Barnett has received. See *id.* Nevertheless, although the reliability of Barnett's sentence is enhanced by many tiers of review, the claim at issue here, the ineffectiveness of trial counsel, due to failure to investigate and present mitigating evidence in the penalty phase, has never been heard on its merits, and directly implicates the reliability of Barnett's sentence.

Barnett, supra, at *55-56.

This factor is in Schad's favor.

5. THE OPINION OF THE NINTH CIRCUIT ESTABLISHES A CLOSE CONNECTION BETWEEN *MARTINEZ* AND SCHAD'S CLAIM. INDEED, THE OPINION DEMONSTRATES THAT SCHAD SHOULD NOW PREVAIL ON HIS IAC AT SENTENCING CLAIM.

This factor is the most obvious and the most weighty. The Ninth Circuit opinion sets a clear roadmap for the applicability of *Martinez* to Schad's claim and concludes that Schad is entitled to review and relief. There can be no more closer

connection that this. Further, this factor is all the more weighty because the IAC claim here goes directly to the reliability of Schad's capital sentence. *See Barnett*.

6. COMITY INTERESTS DO NOT OUTWEIGH SCHAD'S RIGHT TO REVIEW OF HIS MERITORIOUS CLAIM THAT GOES DIRECTLY TO THE RELIABILITY OF HIS CAPITAL SENTENCE.

The Court in *Phelps* explained the role of comity in considering a motion under Rule 60(b)(6).

Finally, the court in *Ritter* also observed that, in applying Rule 60(b)(6) to cases involving petitions for habeas corpus, judges must bear in mind that "[a] federal court's grant of a writ of habeas corpus . . . is always a serious matter implicating considerations of comity." *Id.* at 1403. To be sure, the need for comity between the independently sovereign state and federal judiciaries is an important consideration, as is the duty of federal courts to ensure that federal rights are fully protected. However, **in the context of Rule 60(b)(6), we need not be concerned about upsetting the comity principle when a petitioner seeks reconsideration not of a judgment on the merits of his habeas petition, but rather of an erroneous judgment that prevented the court from ever reaching the merits of that petition. The delicate principles of comity governing the interaction between coordinate sovereign judicial systems do not require federal courts to abdicate their role as vigilant protectors of federal rights.** To the contrary, as the Supreme Court has made clear, "in enacting [the habeas statute], Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)). Even after the enactment of AEDPA, "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). For that reason, the Supreme Court has

emphasized that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) (emphasis added). Accordingly, in applying Rule 60(b) to habeas corpus petitions, the Fifth Circuit has persuasively held that [t]he "main application" of Rule 60(b) "is to those cases in which the true merits of a case might never be considered." Thus, although we rarely reverse a district court's exercise of discretion to deny a Rule 60(b) motion, we have reversed "where denial of relief precludes examination of the full merits of the cause," explaining that in such instances "even a slight abuse may justify reversal." *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) (quoting *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)). We too believe that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. In such instances, including the case presently before us, this factor will cut in favor of granting Rule 60(b)(6) relief.

Phelps, 569 F.3d at 1139-1140 (9th Cir. 2009)(emphasis added). Here, as the Ninth Circuit already found, Schad is faced with an "erroneous legal judgment" that prevents "the true merits of a petitioner's constitutional claims from ever being heard." Because this is a capital case, this factor is all the more weighty.

II. CONCLUSION

Ed Schad presents a substantial ineffective-assistance-of-counsel-at-sentencing claim that has not been reviewed in federal habeas because was it was not properly exhausted by counsel during initial post-conviction proceedings. Under *Martinez v. Ryan*, 566 U.S. ____ (2012), however, Schad

can establish “cause” for the default by showing that initial post-conviction counsel ineffectively failed to raise and exhaust his claim. *Id.* at ___ (slip op. at 11). The “incessant command of the court’s conscience that justice be done” demands Rule 60(b) relief. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); *Klapprott v. United States*, 335 U.S. 601 (1949). Because Schad can satisfy *Martinez*’s “cause and prejudice” standard, and meets the 9th Circuit standard for relief from Judgment under Rule 60(b) this Court should reopen the case and order further proceedings.

Respectfully submitted this 26th of August, 2013.

/s/ Kelley J. Henry

Kelley J. Henry

Denise I. Young

Attorneys for Samuel Lopez

Copy of the foregoing served this
26th day of August, 2013, by CM/ECF to:

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/s/ Kelley J. Henry
Attorney for Edward Schad

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

STATE OF ARIZONA, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> EDWARD H. SCHAD, <p style="text-align: center;">Defendant.</p>	Case No. P1300CR8752 RULING	<p style="text-align: center;">FILED</p> <p style="text-align: center;">JAN 18 2013</p> DATE: <u>4:19</u> O'Clock <u>P</u> .M. SANDRA K. MARKHAM, CLERK B. Chamberlain BY: _____ <p style="text-align: center;">Deputy</p>
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HONORABLE DAVID L. MACKEY DIVISION 1	BY: Cheryl Wagster Judicial Assistant DATE: January 18, 2013
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The Court has considered the defendant's Motion To Waive Informa Pauperis Declaration, Notice of Filing Declaration of Indigency and Notice of Filing Client Certification. The Court also has considered the Supreme Court's January 9, 2013 Order appointing Denise Young as counsel for defendant effective November 8, 2012.

This Court acknowledges the Supreme Court's January 9, 2013 Order appointing Denise Young as counsel for defendant effective November 8, 2012. This Court will pay counsel Denise Young at the rate of \$100.00 per hour for services performed on and after November 8, 2012.

The defendant's Motion To Waive Informa Pauperis Declaration is **MOOT** in that the defendant's Petition for Post-Conviction Relief was permitted to be filed prior to receipt of the filing of the Declaration of Indigency.

The Court has reviewed the defendant's Petition for Post-Conviction Relief ("Successive Petition"), as well as the court's extensive file. The Court has also reviewed the State's Reply to Response and Supplemental Response to Motion for Warrant of Execution filed in the Arizona Supreme Court on January 2, 2013.

The Court may summarily deny a Petition for Post-Conviction Relief on preclusion grounds before the State files a response. *State v. Curtis*, 185 Ariz. 112, 115, 912 P.2d 1341, 1344 (App. 1995), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P. 3d 1067 (2002). For the reasons enumerated below, the Court finds that the claims set forth by defendant are precluded as a matter of law.

Defendant has filed this successive Rule 32 proceeding, simultaneously with his Opposition to the Motion for Warrant of Execution following the State's Motion for Warrant of Execution filed in the Arizona Supreme Court.¹

¹ The Court notes that the Arizona Supreme Court issued the warrant of execution on January 8, 2013 and execution is scheduled to take place on March 6, 2013.

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Defendant was convicted in 1979 of the murder of Lorimer Grove, and sentenced to death. The conviction and sentence were affirmed on direct appeal. *State v. Schad (Schad I)*, 129 Ariz. 557, 633 P.2d 366 (1981). Defendant then sought post-conviction relief, which the trial court denied. Upon petition for review, however, the Arizona Supreme Court reversed the conviction and remanded the case for a new trial. *State v. Schad (Schad II)*, 142 Ariz. 619, 691 P.2d 710 (1984).

At the 1985 retrial, defendant was again convicted by a jury of first degree murder. Following a sentencing hearing, the court found three aggravators proven, F1 (prior conviction in which sentence of life or death imposable), F2 (prior violent offense) and F5 (pecuniary gain), determined that the mitigation presented was not sufficiently substantial to overcome any one of the aggravators, and sentenced defendant to death. The Supreme Court again affirmed the conviction and sentence on direct appeal. *State v. Schad (Schad III)*, 163 Ariz. 411, 788 P.2d 1162 (1989).

Defendant then unsuccessfully pursued post-conviction and federal habeas relief.² The Ninth Circuit affirmed the district court's denial of habeas relief, and affirmed the conviction and sentence. *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011).

Defendant's Petition Exceeds the Mandatory Page Limitation

Initially, the Court notes that Rule 32.5, Arizona Rules of Criminal Procedure, mandates that the Petition for Post-conviction Relief not exceed 40 pages. A petition that "fails to comply with this rule shall be returned by the court to the defendant for revision with an order specifying how the petition fails to comply with the rule." Defendant's petition is 70 pages and he has not requested permission to file a petition not in compliance with Rule 32.5. However, because the Court determines that the claims raised by defendant can be addressed and resolved by reference to previous decisions in this matter, the Court declines to return the pleadings, which would serve to further delay the proceedings.

² On December 16, 1991, defendant filed a *Pro Per* Preliminary Petition for Post-Conviction Relief raising 18 claims, including the ineffective assistance of trial counsel, the trial court's failure to consider the plea offer of a life sentence and his dysfunctional, abusive upbringing as mitigating factors, the Arizona Supreme Court's failure to appropriately weigh rehabilitation and exemplary conduct, and the ineffective assistance of appellate counsel. Although this Preliminary Petition was signed by defendant, it appears to have been prepared by Arizona Capital Representation Project counsel, including current counsel Denise Young.

On October 19, 1995, defendant, with assistance of counsel, filed a Supplemental Statement of Grounds for Relief, claiming newly discovered evidence regarding witness John Duncan, "material omissions" in presentence report, ineffective assistance of trial counsel, and prosecutorial misconduct alleging failure to disclose a witness' alleged status as a police agent. On March 27, 1996 the trial court dismissed the majority of the claims raised in both petitions with the exception of the IAC claims. Following additional briefing regarding these claims and several new ones (errors in criminal history and military service, and identifying a new, critical witness), the trial court addressed the remaining claims and dismissed the petition on June 21, 1996. The Arizona Supreme Court denied defendant's petition for review on September 16, 1997.

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Claims Identified in Successive Petition

In this successive petition, the defendant raises six claims³ for relief:

Claim 1: Ineffective assistance of counsel at sentencing (coupled with the ineffectiveness of post-conviction counsel in failing to develop the claim, citing *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012)).

Claim 2: Prosecutorial misconduct (State's failure to disclose impeachment evidence).

Claim 3: Sentencing judge applied "causal nexus" requirement to determine relevance of mitigating evidence, in violation of Eighth and Fourteenth Amendments.

Claim 4: Defendant's sentence is disproportionate to the crime, in violation of Eighth and Fourteenth Amendments.

Claim 5: Defendant's prior Utah conviction was unconstitutionally used as the F1 and F2 aggravators.

Claim 6: Defendant's sentence should be reduced due to his good character and conduct during 34 years of incarceration – the *Lackey*⁴ claim.

Pursuant to Rule 32.6(c), the Court first identifies all claims that are procedurally precluded from Rule 32 relief. A claim is precluded if it was raised, or could have been raised, on direct appeal or in prior collateral proceedings. *State v. Shrum*, 200 Ariz. 115, ¶12, 203 P.3d 1175 (2009); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002); *State v. Mata*, 185 Ariz. 319, 334, 916 P.2d 1035 (1996).

Claim 1: Ineffective assistance of counsel at sentencing

In Claim 1, defendant alleges, in essence, a "failure of mitigation to outweigh the aggravators" claim, faulting either trial counsel (failure to investigate and present evidence at sentencing) or post-conviction counsel (failure to raise the claim).

³ The Court attempted to follow defendant's outline of his Claims for Relief, running from pp. 21-70 of his Successive Petition, but was unable to follow the number/letter scheme; consequently, the Court has simply adopted as "claims" the listing set forth at pp. 1-4 of the Successive Petition.

⁴ *Lackey v. Texas*, 514 U.S. 1045 (1995).

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In *Stewart v. Smith*, 202 Ariz. 446, 450, 46 P.3d 1067 (2002), the Arizona Supreme Court instructed:

With some petitions, the trial court need not examine the facts. For example, if a petitioner asserts ineffective assistance of counsel at sentencing, and, in a later petition, asserts ineffective assistance of counsel at trial, preclusion is required without examining facts. The ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong policy against piecemeal litigation. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002).

The defendant's claim fits squarely within the parameters addressed in *Stewart*. In his first Rule 32 proceeding, he claimed that his trial counsel provided ineffective assistance at sentencing by failing to investigate and present mitigation evidence. Thus, because he asserted an IAC claim in his first petition, the defendant is precluded from asserting IAC at sentencing in this successive petition. As *Stewart* instructs, "preclusion is required without examining the facts." 202 Ariz. at 450.

In addition, the Court finds that Claim 1 lacks merit, for the reasons set forth by the Ninth Circuit in *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). The Ninth Circuit noted that defendant presented additional mitigating evidence in support of his federal habeas petition and that the district court "held that even if the evidence were considered in federal court, the evidence did not show that sentencing counsel was deficient in failing to present it. The court ruled the strategy counsel pursued was competent and that the newly proffered evidence could not have affected the result." *Id.* at 722.

Finally, contained within Claim 1 is defendant's claim that his first Rule 32 counsel was ineffective for failing to raise a claim of IAC at sentencing. *See* Successive Petition at 21-22. Defendant claims that the alleged ineffectiveness of post-conviction counsel, undeveloped previously, is now viable under *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 1315 (2012).

The Arizona Supreme Court has repeatedly held that a claim that Rule 32 counsel provided ineffective assistance in a prior collateral Rule 32 proceeding is not a valid substantive claim under Rule 32. *State v. Mata*, 185 Ariz. 319, 333 n.9, 336-37, 916 P.2d 1035, 1049 (1996); *State v. Krum*, 183 Ariz. 288, 291-92, 903 P.2d 596, 599-600 (1995). This Court is bound to follow Supreme Court precedent.

Defendant ignores this precedent and instead relies on the United States Supreme Court's opinion in *Martinez*. The Court finds that *Martinez* does not squarely address the issue presented here. The issue addressed in *Martinez* concerned federal habeas law and specifically whether the acts or omissions of his attorneys constituted "cause" to excuse Martinez's procedural default. *Martinez* did not establish that a defendant has a federal constitutional right to effective assistance of PCR counsel.

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Moreover, the United States Supreme Court has previously stated that “[t]here is no constitutional right to an attorney in state post-conviction proceedings.... Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)(citations omitted). The Court has also noted that this is true even though there exists a state-created right to counsel on post-conviction proceedings after exhaustion of the appellate process. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

The Court finds that this portion of defendant’s claim for relief is not cognizable in a Rule 32 proceeding under Arizona law.

Claim 2: Prosecutorial misconduct

In Claim 2, defendant alleges that the State failed to disclose impeachment evidence as to the witness John Duncan, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Court finds that this claim is precluded, pursuant to Rule 32.2(a)(3), because it could have been raised in the prior Rule 32 proceeding but was not.

The Court also finds Claim 2 lacks merit, for reasons set forth by the Ninth Circuit in *Schad v. Ryan*. Although the State conceded in the federal habeas proceeding that it should have disclosed the material, the Ninth Circuit agreed with the district court that the omission did not justify habeas relief because it resulted in little or no prejudice, given the extensive impeachment material already available to the defense. The court held that absent prejudice, the prosecutor’s actions did not constitute a *Brady* violation. 671 F.3d at 714-16. Having been addressed by that court in a collateral proceeding, this claim also is precluded under Rule 32.2(a)(2).

Claim 3: Sentencing judge applied “causal nexus” requirement Failure to Consider Mitigation

In Claim 3, defendant alleges that the trial court committed error in failing to consider mitigation evidence. This claim is precluded, pursuant to Rule 32.2(a)(2), because it was raised on appeal and the Arizona Supreme Court not only found that the trial court had properly considered mitigation, but also considered the mitigation in its own independent review of the death sentence. *Schad III*, 163 Ariz. at 421, 788 P.2d at 1172.

The Court also finds that Claim 3 lacks merit, for reasons stated by the Ninth Circuit in *Schad v. Ryan*, 671 F.3d at 722-25. That court found the “state courts did not unconstitutionally fail to consider mitigating evidence” and specifically stated:

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Absent a clear indication in the record that the state court applied the wrong standard, we cannot assume the courts violated *Edding's* constitutional mandates.

Moreover, where, as here, the sentencing court states that it has considered all the mitigating evidence offered, we may not second-guess its actions. *See id.* (“This court may not engage in speculation as to whether the trial court actually considered all the mitigating evidence; we must rely on its statement that it did so.”).”

671 F.3d at 725.

Claim 4: Capital sentence is disproportionate to crime

In Claim 4, defendant alleges that his sentence is disproportionate to the crime, on both constitutional grounds as well as based on the pre-trial plea offer that would have resulted in a life sentence.

The Court finds that Claim 4 is precluded, pursuant to Rule 32.2(a)(2), because it was raised and rejected by the Arizona Supreme Court on direct appeal. *Schad III*, 788 P.2d at 1173. In *Shad III*, the Court conducted an independent review and specifically determined that the death penalty was not disproportionate:

After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. ... We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above “the norm” of first degree murders, or the defendant's background places him above “the norm” of first degree murderers. ... We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. ...

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. ... We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment.

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

163 Ariz. at 422-23, 788 P.2d at 1173-74 (citations omitted).

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Defendant's claim that the existence of a pretrial plea offer establishes the maximum penalty also lacks merit. Before trial commenced for the first time in 1979, the State offered defendant the opportunity to plead guilty to first degree murder and be sentenced to life imprisonment. Defendant alleges that in doing so, the State effectively established the maximum sentence that could be imposed for the crime, notwithstanding his rejection of the offer at that time.

A criminal defendant has no constitutional right to a plea agreement and the State is not required to offer one. *State v. Darelli*, 205 Ariz. 458, 461, 72 P.3d 1277, 1280 (App. 2003). The fact that the State has offered a plea agreement to defendant that he chose to reject does not thereafter bar the State from prosecuting him to full extent of the law. To hold otherwise would violate the separation of powers doctrine. The Court has no authority to reduce defendant's sentence to life imprisonment simply because pretrial the State offered him such a plea.

Claim 5: Unconstitutional prior conviction used as aggravators
Claim 5--Utah Prior Conviction

In Claim 5, defendant challenges the Utah conviction that the trial court found established the F1 and F2 aggravators.

The Court finds this claim is precluded, pursuant to Rule 32.2(a)(2), because it was raised and rejected by the Arizona Supreme Court on appeal. *Schad III*, 163 Ariz. at 418-19, 788 P.2d at 1169-70. Defendant was convicted of second degree murder in Utah in 1968. The murder occurred in connection with mutual acts of sodomy. Although the crime of sodomy was subsequently reduced to a misdemeanor in Arizona, in 1968 sodomy was a felony in both Utah and Arizona. Defendant claimed on appeal that because sodomy was subsequently reduced to a misdemeanor and there was no longer an offense of second degree felony murder in Arizona, his Utah conviction could not be used as a F1 or F2 aggravator. The Supreme Court rejected this argument, finding that it mischaracterized the nature of defendant's Utah conviction:

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. ... The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and -1644, the maximum penalty for second-degree murder in 1968 was life imprisonment.... However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

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Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. *See State v. Schad*, 24 Utah 2d 255, 470 P.2d 246 (1970).

...

The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but *the manner* in which it was performed. ...Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

Schad III, 163 Ariz. at 261, 470 P.2d at 250 (citations omitted).

In addition, even if defendant's claim had merit, he would not be entitled to relief. In its special verdict imposing the death sentence, the trial court found that the total mitigation was not sufficiently substantial to overcome *any one* of the aggravating circumstances. Defendant does not contest the pecuniary gain aggravator in his Successive Petition. As noted by the Arizona Supreme Court, the evidence "strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case." *Schad III*, 163 Ariz. at 261, 470 P.2d at 250. Thus, even if defendant's claim that the Utah conviction was improperly considered as an aggravating factor is colorable, any error is harmless because the pecuniary gain aggravator is sufficient to support a sentence of death.

Claim 6: Good character and conduct (*Lackey* claim)

Defendant's last claim is based on the United States Supreme Court's order denying certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). In *Lackey*, the Supreme Court declined to review a claim that execution of a defendant after he spent many years on death row would constitute cruel and unusual punishment. 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). The Arizona Supreme Court has similarly rejected *Lackey* claims. *See State v. Murdaugh*, 97 P.3d 844, ¶¶ 30-31 (Ariz. 2004); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997).

Defendant's potential for rehabilitation was considered by the Arizona Supreme Court in *Schad III*:

The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitationContrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors.

...

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We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. 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 III, 163 Ariz. at 421, 788 P.2d at 1172.

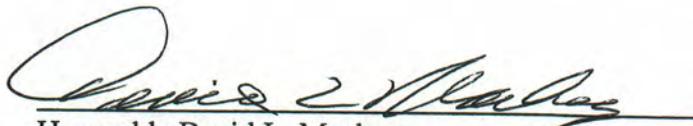
Defendant cites no authority and this Court has found none supporting his contention that it has the authority to reduce a lawfully-imposed sentence absent a finding of a constitutional violation. In *State v. Pike*, 133 Ariz. 178, 650 P.2d 480 (App. 1982), the defendant failed to attack his sentence under Rule 32.1 (b) or (c). Nonetheless, the trial court reduced the sentence based on the defendant's claim of rehabilitation. The Court of Appeals held that the trial court lacked jurisdiction to reduce a lawfully-imposed sentence that had been affirmed on direct appeal because there was no constitutional violation supporting Rule 32.1 relief.

Defendant also appears to assert that he is not precluded from relief at this late stage either because there has been a significant change in the law (Rule 32.1(g)) or that the underlying facts show the trial court would not have imposed the death penalty (Rule 32.1(h)). Neither provision obviates preclusion: as previously determined, *Martinez* is inapplicable, and the decisions of all the courts previously reviewing this matter have affirmed imposition of the death penalty. For this reason and because counsel has failed to set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner, the Court finds neither Rule 32.1(g) nor Rule 32.1(h) applicable.

The Court finds that defendant has failed to raise any colorable claims for relief and that no purpose would be served by any further proceedings.

IT IS THEREFORE ORDERED dismissing defendant's Successive Petition for Post-Conviction Relief.

DATED THIS 18th DAY OF JANUARY, 2013


Honorable David L. Mackey

cc: Kent Cattani – AAG, 1275 W. Washington, Phoenix, AZ 85007
Denise I. Young – 2930 N. Santa Rosa Place, Tucson, AZ 85712

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)
) Arizona Supreme Court
) No. CR-13-0058-PC
Respondent,)
) Yavapai County Superior Court
v.) No. P1300CR8752
))
EDWARD HAROLD SCHAD, JR.,)
))
Petitioner.) **FILED 02/26/2013**
))
) **O R D E R**

Edward Schad, Jr., has filed a Petition for Review of the superior court's ruling dismissing his petition for postconviction relief on January 18, 2013. The Petition for Review includes a Motion to Recall the Mandate. Upon considering the Petition and Motion, the State's Opposition, the Reply and all appendices,

IT IS ORDERED that the Petition for Review is denied.

IT IS FURTHER ORDERED that the Motion to Recall the Mandate is denied.

DATED this _____ day of February, 2013.

For the Court:

REBECCA WHITE BERCH
Chief Justice

Arizona Supreme Court No. CR-13-0058-PC
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TO:

Kent E Cattani

Jeffrey A Zick

Jon G Anderson

Denise I Young

Kelley Henry

Edward Harold Schad Jr., ADOC 040496, Arizona State Prison, Florence
- Eyman Complex-Browning Unit (SMU II)

Hon David L Mackey

Sandra K Markham

Diane Alessi

Amy Sara Armstrong

Dale A Baich

DECLARATION OF CHARLES A. SANISLOW, PH.D.

I, Dr. Charles A. Sanislow, declare as follows:

1. I am a clinical psychologist licensed to practice in the State of Connecticut. Prior to earning my doctoral degree in clinical psychology, I had been licensed as a psychological associate in the State of North Carolina. I received my Bachelor of Science degree from Northern Michigan University in 1985, with a major in psychology and minor focuses in mathematics, biology, and chemistry. In 1987, I received a Master of Arts degree in psychology from Ball State University. As part of that program, I completed a clinical practicum at the Marion Indiana Veterans Administration Medical Center in the assessment and treatment of acute psychopathology and the assessment and treatment of veterans suffering from Posttraumatic Stress Disorder. In 1994, I received a Ph.D. from Duke University. My doctoral dissertation examined personality characteristics hypothesized to vulnerability factors for depression and other major affective disorders.

2. From July of 1993 through June of 1995, I completed pre- and post-doctoral fellowships in clinical psychology at Yale University School of Medicine. My pre-doctoral fellowship training concentrated on the assessment and treatment of acute and severe psychopathology, including affective disorders (e.g., depression and manic depression, also known as Bipolar Disorder) and schizophrenia; and on the treatment of dually-diagnosed individuals (e.g., those suffering from a major mental illness in combination with a substance abuse/dependence disorder). During my post-doctoral training, I specialized in the assessment and treatment of severely disturbed adolescents and young adults, developing a treatment program specifically aimed at dually-diagnosed

adolescents. I continued to oversee that program during my first year on the faculty of Yale University School of Medicine.

3. From July of 1995 through June of 1996, I was a Clinical Instructor of the faculty of the Yale University School of Medicine. During that time, I coordinated a partial hospital program for adolescents and began development of a program to assess and triage juvenile offenders suffering mental illness. Since July of 1996, I have been an Assistant Professor of Psychiatry in the Psychology Section of the Department of Psychiatry at Yale University School of Medicine. In that capacity, I train and supervise psychiatric residents, pre- and post-doctoral fellows in clinical psychology, and social work fellows in conjunction with the Clinical Psychology Internship training program.

4. Much of my professional work, both clinical and academic, has been focused on the assessment of personality disorders and their co-morbidity (or co-occurrence) with Axis I major mental illnesses – e.g., depressive disorders, Bipolar Disorder, and Posttraumatic Stress Disorder. The methods that I use are based in clinical assessment and multivariate statistics. I also study these disorders using methods from cognitive neuroscience including neuroimaging techniques. I presently coordinate a study funded by the National Institute of Mental Health [NIMH] to investigate the course and stability of personality psychopathology, on which I hold the title Co-investigator. I am the Director of the Assessment Unit at the Yale Center for the Assessment and Treatment of Borderline Personality Disorder. In my leadership capacity for these research programs, I supervise post-doctoral fellows in conducting semi-structured clinical diagnostic interviews and psychological assessments of persons with severe mental illness.

5. My work has been published in scholarly journals, including *Acta Psychiatrica Scandinavica*, *American Journal of Psychiatry*, *American Journal of Psychotherapy*, *Biological Psychiatry*, *Canadian Journal of Psychology*, *Comprehensive Psychiatry*, *Journal of Abnormal Psychology*, *Journal of Clinical Psychiatry*, *Journal of Comparative Psychology*, *Journal of Consulting and Clinical Psychology*, *Journal of Nervous and Mental Disease*, *Journal of Personality Assessment*, *Journal of Personality Disorders*, *Journal of Psychiatric Practice*, *Journal of Social and Clinical Psychology*, *Personality and Individual Differences*, *Psychiatric Services*, *Psychiatry Research*, *Psychiatry: Interpersonal and Biological Processes*, *Psychological Assessment*, *Psychological Medicine*, *Psychotherapy Research*, and *Small Group Behavior*. My work also includes two editions of a graduate-level textbook chapter on schizophrenia. I regularly present my research findings at national meetings for psychology and psychiatry associations including the American Psychiatric Association and the American Psychological Association. A copy of my *curriculum vitae* is attached to this declaration.

6. At the request of current counsel for Edward Harold Schad, Jr., I have reviewed extensive records and other documents relating to Edward Schad, Jr. and members of his immediate and extended family. The purpose of this review was to compile, assess and synthesize that material in the form of a social history, set forth in this declaration. Specifically, I have been asked to identify those factors – familial, social, developmental, psychological and institutional – that shaped and influenced Edward Schad, Jr.'s cognitive and psychological development and his behavioral functioning as an adult. To reach my opinions, I have relied upon numerous records, documents, historical materials and other data provided by counsel. These include

academic, military and institutional records of Edward Schad, Jr., as well as his prior medical and psychiatric records and evaluations. They also include law enforcement, parole, and custody/correctional records, as well as sentencing transcripts, pre-sentencing files and reports, and other case-related materials from legal proceedings in New York, Wyoming, Utah and Arizona.

7. I have also reviewed records and documents pertaining to Edward Schad, Jr.'s father, Edward Schad, Sr., including his military records, historical documents pertaining to his [Schad Sr.'s] detention as a prisoner-of-war in an Austrian prison camp, and his medical and psychiatric records, most of them from the Veterans Administration following World War II. I have also reviewed medical records of Edward Schad, Jr.'s mother, Mabel Cole Schad [now Hughes], as well as her Social Security Administration documents and numerous vital records regarding Mrs. Schad's extended family. Also provided were medical and psychiatric records of Edward Schad, Jr.'s younger brother Thomas Francis Schad, most of them from his military and VA records. Additional records and data regarding these and other family members, useful in obtaining and corroborating accurate life history information, were also provided. To ensure that my assessment is as thorough and reliable as possible, I have specifically requested that counsel obtain and provide me with all additional documents that become available.

8. I have reviewed the sworn declarations of numerous lay witnesses, including family members who knew Edward Schad, Jr. and his parents at critical points in his development. I have also reviewed the sworn declarations of Drs. Leslie Lebowitz and George W. Woods, previously filed in this case. The findings and observations of Dr. Lebowitz are especially relevant, as she assesses certain critical factors which

contributed to Edward Schad, Jr.'s early development – specifically, the nature and effects of his father's experiences as a prisoner-of-war during World War II (while Ed Jr. was an infant); his [Schad Sr.'s] subsequent medical and psychiatric deterioration (during Ed Jr.'s childhood and adolescence); and Mrs. Schad's psychological disabilities, symptoms of which are apparently evident even today.

9. Finally, I met and interviewed Edward Schad, Jr. for 4 hours on February 18, 2000 and 3½ hours on February 19, 2000. The interviews took place on the Special Management Unit [SMU-II] at Arizona State Prison [ASP] in Florence, Arizona. For purposes of this assessment, the circumstances and constraints of those interviews and the events surrounding them are extremely significant. To conduct a proper clinical interview, I requested confidential contact visits in which Edward Schad, Jr. would be uncuffed and unshackled. I had reviewed his prison records and was aware of no history of violence in the institution. In fact, Edward Schad, Jr. appears to have an exemplary prison record. I was told that contact visits were not the norm for condemned inmates, even for visits with attorneys and their representatives. Counsel informed me that the contact visits I had requested could not take place without a court order. I also learned that these rules had been in effect at SMU-II since 1997¹, such that Edward Schad, Jr. had not had a contact visit, even with his own counsel, for three years before our visit. My subsequent interviews with Edward Schad, Jr. revealed the significance of this history.

10. At my urging, counsel obtained an order for contact visits from Judge Roslyn Silver. The order required that Edward Schad, Jr. be uncuffed during our

¹ Arizona Department of Corrections Regulations, Chapter 900, Department Order 911.04.1.6.1 (contact visits are not permitted at Special Management Units)

interviews, but stated that "Petitioner may remain in leg irons."² Judge Silver's order also detailed the conditions of our meetings, including observation by custodial staff and seating arrangements within the designated interview room. For example:

The room may have windows which allow the Warden, through staff, to observe the meeting. Dr. Sanislow and Mr. Pultz are to sit at chairs closest to the door, and Petitioner is not to go between Dr. Sanislow and Mr. Pultz and the door without permission....³

Pursuant to that order, our interviews took place in the office of a prison administrator. Edward Schad, Jr. was escorted to the room in shackles and handcuffs, which were removed inside the interview room in my presence.

11. We sat, as required on opposite sides of a large desk. Observation by custody staff was accomplished by means of a large window located to my back and extending the full width of the room and several feet high (from approximately waist-height to the ceiling). The window looked onto a large open space. Throughout our interviews, custody staff ranging in number from three to more than six, observed us from that area. In addition to the officers assigned to observe our meetings, other guards and other prison employees passed by the window regularly. Prison guards were in Edward Schad, Jr.'s line of vision whenever he looked at me or counsel. At times during the assessment, Edward Schad, Jr. appeared to be concerned that the staff was watching from outside the window.

I. INTRODUCTION AND OVERVIEW

12. Edward Harold Schad, Jr. was born to a family environment marked with frequent physical abuse, emotional neglect and abandonment, mental illness, chemical dependency, and severe stresses at every stage of his life. These stressors had a profound

² February 9, 2000 Order of Roslyn O. Silver, United States District Judge, ¶4.

impact on him and increased his susceptibility for developmental, psychological and debilitating mental disorders. The chronic trauma and intense grief present in his family produced patterns of psychosis and emotional neglect that took away the ability for Ed Jr. and his family to develop and sustain healthy, responsive relationships critical to developing a healthy psyche. Grief and trauma that is left unresolved not only lead to profound sadness or clinical depression but can also alter the structure and function of the brain and decrease the effectiveness to responding to future stressful events. Ed Jr.'s mother and father created an environment filled with unrelenting and unpredictable chaos and psychosis and stressful events that placed their children at risk for developing clinically significant mental illness and possibly alterations in brain function. Predictably, it appears that Ed Jr. and his siblings have suffered from significant and sometimes chronic mental illnesses and the impaired psychosocial functioning that is part and parcel of these disorders.

13. As is often the case in mental ill and severely dysfunctional families, the legacy of Edward Schad, Jr.'s family is cloaked in denial and silence in the face of profound mental illness and extraordinary trauma. Such avoidance and denial of situations and people who were at times psychotic, clinically depressed, suffered from addictions, or who were capable of untoward acts of violence and abuse, is in part enacted as a survival strategy for both the family unit or of its individual members. In this sense, denial or covering up of these severe problems goes beyond avoiding "embarrassment." Rather, it is a pathological defense mechanism that is brittle in the sense that it provides immediate relief by holding mental distress at bay yet in the long term makes it virtually impossible to take corrective action. Cold, unaffectionate,

³ *Ibid*, ¶5.

distant, and disconnected relationships, in which the caretakers alternated between controlling and violent behaviors and depressed or psychotic and abandoning ones, characterized Ed Jr.'s young life. Trauma, substance abuse, anxiety, psychosis and mood disorders were also evident across these generations. This placed the members of these families at an increased risk for developing similar disorders as well as ensuring that these children would not receive the care-taking relationships necessary for healthy psychological and neural development. It also ensured that the Schad children would not develop healthy coping strategies that might mitigate the effects of mental illness.

14. It is thus not surprising that Ed Jr. did not know how to protect himself in this family. Perpetually, he attempted to get basic needs met and to try to strengthen relationships when it was not possible. This ultimately became his role in life—that of caretaker or peacemaker, grasping at shadows to find some semblance of normal relationships in a very dysfunctional socio-family system wrought with mental illness. The extent to which the disordered family history and damaging family dynamics pervaded the household and scarred its members, was also manifested in the difficulties Ed Jr.'s siblings encountered as they grew up. The lack of any consistent parenting unlocked vulnerabilities for a range of mental illnesses by disrupting important developmental experiences.

15. Due to the constant danger and fear in his family life, Ed Jr. had to be hypervigilant to survive. Signs of hyperarousal, agitation, guardedness, and paranoia became integral to his interpersonal style and have stayed with him, in one form or another, to this day. In the context of his father's alcoholism and the affective disturbance, and interpersonal violence related to and exacerbated by his drinking, the

lack of overall safety and stability experienced among family made these behaviors adaptive in one sense because the family environment was truly unsafe. On the other hand, the impact of these behaviors on Ed Jr.'s psychological development likely opened vulnerability to mental illness, in particular disturbances in affect.

16. Ed Jr. and his siblings were subjected to the same patterns of secrecy, shame, violence, abuse, and neglect that haunted his family [for generations]. Thus, there was no place for Ed Jr. to turn for a healthier alternative. The familial history of mental illness and substance abuse took their toll on Ed Jr.'s parents and he was raised by two people who both became increasingly mentally ill and substance-dependent. They themselves were struggling with their own untoward histories and lacked the capabilities and resources to change course and instead maintained an environment that reinforced destructive and dysfunctional behaviors.

II. BACKGROUND AND FAMILY HISTORY

17. An accurate mental health assessment requires a thorough understanding of the patient's background, including the medical, social, developmental and psychiatric histories of immediate and extended family members, as well as any familial patterns that emerge. One of the most widely recognized texts on psychiatric diagnosis and treatment states that a thorough assessment must include "a complete family history, including the patient's relationships with significant individuals, the role of illness in the family, and a history of mental illness within the extended family."⁴ A detailed family history is

⁴ Kaplan, H.I. & Sadock, B.J. (Eds.) (1995). *Comprehensive Textbook of Psychiatry-Sixth Edition*, p. 526. This edition reiterates the standards articulated in earlier editions. See also Ludwig, A.M. (1986). *Principles of Clinical Psychiatry (Second Edition-Revised)*. New York: The Free Press, at p. 37. The same standard is specifically recognized in forensic settings. See, e.g., Bonnie & Slobogin (1980), "The

essential for several reasons. First, it is generally understood that there is a genetic component to the etiology of many of the major psychiatric disorders, including the serious mood (or “affective”) disorders (e.g., Major Depression, the other depressive disorders, and Bipolar Disorder) and anxiety disorders (e.g., Posttraumatic Stress Disorder). The same is true for substance-related disorders (e.g., alcoholism and drug abuse/dependence), as well as childhood learning and behavioral disorders (e.g., Attention-Deficit/Hyperactivity Disorder and learning disabilities). Thus, certain individuals are at risk of developing psychiatric conditions similar to those of biological relatives.⁵

18. Many medical illnesses have enormous implications for the patient’s mental state and behavior, and can influence (even disrupt) the entire family’s emotional functioning. Furthermore, many medical conditions have associated psychiatric features or consequences. For example, epilepsy and other seizure disorders can cause significant impairments in memory, mood and perception; chronic pain (such as that suffered by Edward Schad, Sr. throughout his adult life) is often accompanied by severe depression or mental confusion; migraine headaches can cause a range of psychiatric symptoms,

Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation,” 66 *Va. L. Rev.* 427.

⁵ See *Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition-Text Revised [DSM-IV-TR]* (2000). Washington, DC: American Psychiatric Association. The *DSM*, first published by the APA in 1952 and periodically revised, sets forth the diagnostic criteria for all mental disorders. The version is used at the time of Mr. Schad’s 1985 trial (the *DSM-III*) and all subsequent revisions have stressed the genetic component of these psychiatric disorders. Each revision of the *DSM* has included some changes in the standard diagnostic nomenclature. Some changes have been semantic (e.g., Major Depressive Disorder, as opposed to Major Depression). In other cases, new diagnoses have been included to recognize conditions which had previously been unnamed or otherwise characterized (e.g., Posttraumatic Stress Disorder, which was added to the *DSM-III* in 1980). In this declaration, I use upper case letters when discussing specific diagnoses, as currently labeled, or to distinguish between psychiatric symptoms (or descriptions) and diagnoses at the relevant time (e.g., depression as a symptom, as opposed to Depression, a *DSM-III* diagnosis).

including depression and anxiety, disorientation, dissociation, even hallucinations.⁶ Many of the medications used in the treatment of medical conditions or injuries – e.g., opioid analgesics – can themselves have profound psychiatric consequences as they are highly addictive.

19. Moreover, an individual's mental state can be caused, exacerbated or complicated by his/her life experiences. It is widely acknowledged that one's environment and early development can have a powerful effect on mental health. Healthy developmental experiences can provide the skills to overcome adversity, be it genetic, biological, or environmental in nature. Thus, traumatic experiences (individual and/or collective), familial attitudes toward children and child-rearing (including the use and manner of discipline, exposure to domestic discord, and physical or psychological maltreatment), the presence of mentally ill or drug-dependent family members in the home, social isolation or disenfranchisement, economic and/or educational deprivations, attitudes toward mental illness and medical treatment, and the presence or absence of support – financial or emotional, from within the family or outside – can shape and influence that individual's emotional development, cognitive functioning, and resilience.

20. Edward Harold Schad, Jr. was born on July 27, 1942 in Syracuse, New York.⁷ He was the first child born to Mabel Jeanne Cole and Edward Harold Schad [Sr.], who had been married in a civil ceremony 7½ months earlier. Ed Jr.'s parents were both born into working class families in upstate, New York. They remained married until Edward Sr.'s death in 1973. Mabel subsequently remarried and is now known as Mabel

⁶ See generally Kaplan & Sadock, *supra*, at pp. 819-820. Other medical conditions with psychiatric symptoms include hypertension, diabetes, thyroid disorders, syphilis, liver failure, Parkinson's disease, blunt head trauma, AIDS, and cardiovascular disease, some of which appear in the records or are observed in lay reports regarding Mr. Schad's first- and second-degree relatives.

Hughes. Most of Ed Jr.'s relatives, from both sides of the family, still live in the Syracuse area. Much of the history of Ed Jr.'s extended family is set forth in the declaration of Dr. Lebowitz. Rather than repeat that information, I incorporate by reference ¶¶ 10-54 of that report. Additional details and discussion are set in forth in the paragraphs below.

Maternal Family

21. Family patterns of trauma including physical abuse and neglect, and abandonment of children, as well as environmental risk factors of poverty and lack of education have been present through numerous generations on the maternal side of Ed Jr.'s maternal family.

22. Mabel Jeanne/Leona Cole⁸ was born in Binghamton, New York on September 2, 1917 (Mabel's birth certificate); she was the youngest of four children born to Nelson Cole who at the time of Mabel's birth was a 29 year-old brakeman for the railroad and Fidela Saynor, a 24 year-old housewife born in Illinois. Mabel's known siblings are Mary Helen, Edward Nelson, and Francis Allen. Nelson Cole was born on December 5, 1887 in Binghamton, New York to James Cole, a 24-year-old laborer, and Nellie Purdy who was also 24-years-old.⁹

23. Ed Jr.'s maternal great-great grandfather, James A. Cole, was born in Nichols, New York in 1863. James Cole spent his life working as a laborer. Ed Jr.'s great-great grandmother, Helen "Nellie" Purdy was also born in 1863 in Athens,

⁷ Birth certificate of Edward Harold Schad, Jr. (7/27/42—Syracuse, New York).

⁸ See Lebowitz Decl., ¶ 40 & fn. 31.

⁹ See Transcript from the Register of Births of Nelson Cole (12/5/1887—Binghamton, New York).

Pennsylvania¹⁰. James Cole and Helen were married and had four children; Nelson E. Cole, Mildred L. Cole, Thelma Cole, and a daughter who nothing is known about except her married name, Mrs. Clint Adams.

24. Mabel moved with her father and 3 siblings to Syracuse, New York when she was still a child. Census records indicate that while the Cole family moved around quite a bit they stayed mostly within the Syracuse area. Mabel's father, Nelson Cole, worked for a trolley car company in Binghamton as a motorman for many years before he became a fireman for the DL & W Railroad Company in Syracuse, New York. He was a member of Lodge 367 and Brotherhood of Locomotive Engineers.¹¹ According to the Syracuse City Directory, Nelson Cole and his companion or possibly his wife, Eva, began living together in 1933.¹² Nelson Cole passed away on March 24, 1953 from stomach cancer; Mrs. Eva Cole, Nelson's wife, was listed as the informant.¹³ Nelson's obituary states that he died at home after suffering from a long illness. He was survived by his spouse, Eva Cole, his four sons; Edward N., Francis A., Michael Cole all from Syracuse and Edward Jennings from Corning, New York and his three daughters; Mrs. Helen Orio, Mrs. Mabel Schad, and Mrs. John Torzon, and his three sisters, Mrs. Mildred Payne, Mrs. Clint Adams, and Mrs. Thelma Failkowski.¹⁴ Mabel's step-mother Eva Cole died of a respiratory arrest on September 5th, 1987; her next of kin was Mike Cole.¹⁵ Her obituary reveals that while she was born in Groton, New York, she spent most of her life in Syracuse. She was employed at the same place Ed Jr.'s mother worked, the Crouse-

¹⁰ See Transcript from the Register of Births of Nelson Cole (12/5/1887—Binghamton, New York).

¹¹ See Obituary of Nelson Cole *Syracuse Herald-Journal* (3/24/53).

¹² See *Polk's Directory—Syracuse, New York*.

¹³ Death certificate of Nelson Cole (3/24/53 – Syracuse, New York).

¹⁴ Obituary of Nelson Cole *Syracuse Herald-Journal* (3/24/53).

¹⁵ See Cemetery records of Eva S. Cole.

Hinds Company; she worked there for 20 years. She was survived by a daughter, Charlotte Torson of Syracuse, a son, Michael of Liverpool, seven grandchildren, and three great-grandchildren.¹⁶

25. What happened to Mabel's mother is still a mystery; her mother either died or left the family when Mabel just was an infant. There are large gaps in our understanding of Mrs. Schad's family history, which is shrouded in silence, secrecy, and isolation. Dr. Lebowitz reports that Mrs. Schad was "unwilling or unable to disclose much information – a pattern instilled in her children as well." (Lebowitz Decl., ¶ 42.) It will become clear in later aspects of this declaration that Ed Jr., like his mother, is frequently reluctant [or is unable] to disclose information about him and the psychological stressors that he has endured throughout his life; instead he attempts to hide his pain by painting a picture perfect exterior. This likely stems from his years upholding this role in his family as well as effortful control to ward off his own shame and psychological distress.

26. That pattern of pervasive secrecy, mystery, and shame regarding family information (or misinformation), played a prominent role in the emotional and social development of Ed Schad, Jr. and his siblings. Shame attacks a person's perception of not only their actions but for individuals with mental illness, their entire self. The effects of shame can be quite debilitating as a person interprets everything about themselves in a negative light.¹⁷ Information regarding Mabel Schad's mother (Ed Jr.'s grandmother) is an excellent example. Although Mabel's birth certificate identifies her mother as Fidela

¹⁶ See Obituary of Eva S. Cole, *Syracuse Herald-Journal*.

¹⁷ Lewis, H.B. (1971). *Shame and guilt in neurosis*. New York: International University Press.

Saynor,¹⁸ the birth certificates of Ms. Saynor's other children identify her as Adella Saynor,¹⁹ Delia Saynor,²⁰ and Della Fidelia Saynor.²¹ While this might be attributed to poor record keeping, conflicting information of this sort is not seen in the records of other family members from that time period.²² It is also interesting that similar inconsistencies later appear in the records regarding Mabel herself, who gives different middle names and ages on her marriage certificates and the birth certificates of her own children.²³

27. Regarding her mother, Mrs. Schad (now Mrs. Hughes) reports:

I did not know my mother, Della Cole. I was told that she drowned when I was about three months old. For most of my childhood, my sister and brothers and I lived with our father, Nelson Cole, and an aunt. (Hughes Decl., ¶ 2.)

28. Dorothy Cole Johnson, Mabel's sister-in-law, gives a very different account of Della Cole, one which reportedly came from Mary Helen Cole, the eldest of Mabel's siblings:

Helen told me that one day when she was a young girl and Mabel was a baby, their father, Nelson Cole, brought home a young woman, and told his wife – Della – to leave the bedroom so that he and his girlfriend could use it. At the time, Della was pregnant with twins. Helen said that a few days after this incident, her mother left and never returned. Helen later learned that her mother had moved to Philadelphia where she gave birth to twin girls. Helen also learned, or believed, that her father's parents had helped her mother escape from her father. They also helped her settle in Philadelphia.

Helen told me that none of the children ever saw their mother again. From my conversations with Mabel, I knew that she knew that her mother had left her father, but she always denied knowing the reasons she left him. (Johnson Decl., ¶¶ 4-5.)

¹⁸ Birth certificate of Mabel Leona Cole (9/2/17 – Binghamton, New York).

¹⁹ Birth certificate of Mary Helen Cole (7/7/12—Madison County, New York).

²⁰ Birth certificate of Edward Nelson Cole (7/4/14—Madison County, New York).

²¹ Birth certificate of Francis Allen Cole (8/15/16—Binghamton, New York).

²² While vital records are generally only as accurate as the individual providing the information, the "reporter" of information on birth certificates is more likely to be the mother herself – in this case, Ms. Saynor.

²³ See Lebowitz Decl., ¶ 40 & fn. 31.

29. Dorothy Johnson's account is striking in several respects. The level of detail suggests either credibility or an unusually elaborate family myth. The source of Ms. Johnson's information, Mabel's elder sister, was presumably in a position to know what actually happened. If this account is accurate, Mabel Schad had two full sisters that she does not acknowledge. Perhaps more important, Ms. Johnson describes an atmosphere of open hostility and betrayal between Mabel's parents, one which resulted in abandonment at a very young age and a sense of shame which continues to this day.

30. The report that Nelson Cole's parents, James A. Cole and Helen ("Nellie") Purdy, assisted their daughter-in-law (Della) in leaving their own son and their grandchildren, if true, is subject to several interpretations. It might suggest that Nelson Cole's behavior was so obviously unacceptable that even his own parents sought to protect his wife from their son. On the other hand, it might indicate their hostility toward Della Saynor Cole. Either interpretation suggests that the domestic discord of Mabel's youth was chronic and extended beyond the immediate household. Finally, while recognizing that Mabel does not acknowledge the reasons for her mother's absence, Ms. Johnson reports that Mabel had been informed that her mother left the family, as opposed to "drowning."

31. It is probably impossible to determine what actually became of Della Saynor Cole. Regardless of the details, the result was what Dr. Lebowitz describes as "a childhood marred by loss and deprivation." (Lebowitz Decl., ¶ 43.) While Mrs. Schad apparently discussed very few details of that childhood, those she provided were significant, especially regarding her relationship to her sister, Mary Helen Cole, whom

she refers to as Marian: “My sister Marian was so much older than me that for much of my childhood, I believed she was my mother.” (Hughes Decl., ¶ 2.)

32. Dr. Lebowitz discusses the strength of the “family lore” suggested by this assertion:

If the birth certificates of Mabel’s siblings are accurate, the age difference between Mabel and her eldest sister was just over five years. Even accepting the birthdate she [Mabel] used in later years..., stretching the age difference to seven years, the gap does not seem sufficient to elevate this sister to the status of mother, especially with two other siblings closer in age to both of them. What is striking and consistent with the telling of other family “facts” is that the family lore has apparently gone unquestioned. Mrs. Hughes related this account with confidence and evident respect for its place in her history. Further, if Mrs. Hughes was primarily mothered by a child only 5-7 years her senior, one would assume that the quality of the mothering she received was inadequate. (Lebowitz Decl., ¶ 44.)

Mabel’s report that she was raised by her father is confirmed by other accounts. Again, Dorothy Cole Johnson provides details:

Nelson [Cole] later lived with a woman named Eva, who had one or two children from a former marriage. It was always my understanding that Nelson never married Eva, but they lived as ‘common-law’ husband and wife. (Johnson Decl., ¶ 5.)

Whether or not Ms. Johnson’s reports are accurate, they are relevant in that they reveal the perceptions of other family members.

33. We know that Mabel’s father and siblings lived very close to her and her children, including Ed Jr., for most of their lives. Mabel’s father lived in Syracuse until his death in 1953.²⁴ According to Census data, Nelson Cole and his four children lived with Nelson’s mother, father, and his sister Mildred in 1920; Mabel’s mother is not listed

²⁴ See Obituary of Nelson Cole, *Syracuse Herald-Journal* (3/24/53); Lebowitz Decl., fn. 33.)

as a resident in the house.²⁵ For the next ten years Nelson lived with his sister Mildred at various addresses in Syracuse.²⁶

34. Mabel's sister (or surrogate mother) Mary Helen lived in Syracuse, until her death in 1981, literally blocks away from Mabel Schad and her family.²⁷ It appears, however, that following her marriage to Edward Schad, Sr., Mabel had virtually no contact with anyone in her family other than her brother Francis, who died in 1974. She acknowledges the lack of contact, but has been vague (or perhaps withholding) about the causes of their estrangement:

During our interview, Mrs. Hughes spoke as though she had no family in the area (greater Syracuse), and she identified this lack of biological ties as a source of sadness for her, especially during the early years of her marriage... (Lebowitz Decl., ¶ 45.)

35. Mabel Schad's isolation of herself and her family from the potential support from her own extended family can be seen as a family that is cloaked in shame and secrecy; the very act of uncloaking the trauma can cause psychological distress and exacerbate symptomatic behavior. It is as if one's sense of self is under attack and the only way to deny the presence of any underlying psychiatric disorder is to defend against it and to distort by denying, minimizing, or failing to recognize what an impartial observer would see as a severe situation.

36. Ed Jr. reports that he never met his maternal aunt, Mary Helen Cole. Mary Helen passed away on October 1, 1981 in Syracuse, New York from respiratory failure due to breast cancer. She was employed as a laundress at the Coyne Laundry

²⁵ See 1920 Federal Census Listing from the Broome County Public Library, Binghamton, New York.

²⁶ See *Polk's Directory—Syracuse, New York 1920-1929*.

²⁷ See Obituary of Mary H. Ashley, *Syracuse Herald-Journal* (10/2/81); Lebowitz Decl., ¶ 45 & fn. 33.)

located in Syracuse, New York.²⁸ His only contact with his mother's family (and apparently Mabel's only contact as well) was with his uncle Francis Cole and his wife, Dorothy.²⁹ Contacts with his father's family, on the other hand, were a major part of Ed Jr.'s childhood and adolescence.

37. Francis Allen Cole died on February 7, 1974 in Pensacola, Florida. At the time of his death he was retired from the civil service.³⁰ His widow, Dorothy remarried in 1989 to a man named Gustave Johnson.³¹ Francis and Dorothy stayed with Mabel's brother Edward Cole the night after they were married. They desperately needed a place to stay and Dorothy helped Ed's wife, who was also named Dorothy, take care of her baby. Violent behavior at the hands of Mabel's brother became evident almost immediately:

...The morning after the second night in their small apartment, after my new husband Francis had left for work, and after Dorothy had left her baby with me to watch while she ran errands, Ed Cole tried to rape me. He grabbed me and threw me to the floor. He said he was going to "take me." I got away from him, ran down the stairs and hid in a nearby park in the rain, until my husband came home from work. I told Francis what Ed had done. Francis went into the duplex, threw his brother down the stairs, then took him outside and beat him up. We then found an apartment to live in that night. I never saw Ed again, until right before his father, Nelson, died. My husband Francis told me that his brother Ed was a "bad person." [Johnson Decl., ¶ 6.]

Paternal Family

38. Edward Harold Schad [Sr.] was born in Syracuse, New York on August 24, 1920. He was the ninth of nine children born to Katherine Elizabeth Hauser, then 40

²⁸ Death certificate of Mary H. Ashley (10/1/81 – Syracuse, New York).

²⁹ Mabel Cole Schad's ongoing contact with Dorothy Cole [Johnson] lends credibility to Ms. Johnson's reports of their discussions regarding Mabel's mother.

³⁰ Death certificate of Francis Cole (2/7/74 – Pensacola, Florida).

years old, and John Baden Schad, a 44-year-old ironworker.³² Those children were, in order of birth: Zelma, Edna May, Lillian, Joseph R., John A., Katherine M., Howard A., Marion, Edward Harold [Sr.], and William C.³³ The age range between Zelma and William, almost 25 years, was wide enough that “Zelma had two children of her own before Marion and Ed [Sr.] were born.” (Deptula Decl., ¶ 9.) All of Ed Jr.’s paternal aunts and uncles were reportedly born in Syracuse.³⁴ With the exception of Marion Schad Whelan, all are now deceased. Ms. Whelan, who still lives in Syracuse, provided much of the information contained in this section of my report.³⁵

39. Both of Ed Jr.’s paternal grandparents were apparently born in New York.³⁶ Edward Sr.’s father, John Baden Schad, was born on October 12, 1876 in Syracuse, New York.³⁷ Here, again, Mabel gives a conflicting report, at least with respect to her mother-in-law: “I believe she [Ed Jr.’s grandmother] spoke German, but I’m not sure.” (Hughes Decl., ¶ 14.)³⁸ What seems more likely is that Ed Jr.’s great-grandparents, John Sr. and Josephine Schad, emigrated from Germany.³⁹ Edward Sr.’s father John died on December 23rd, 1926 of pneumonia in Syracuse, New York when Edward Sr. was just six years old.⁴⁰ This early and unexpected death of his father may have been a traumatic event for Edward Sr. and had repercussions for the entire family.

³¹ Marriage certificate of Marriage of Dorothy Cole and Gustave Johnson (4/10/76 – Syracuse, New York).

³² Birth certificate of Birth of Edward H. Schad (8/24/20—Syracuse, New York).

³³ See Death certificates of Katherine M. McDonald (5/18/84—Syracuse, New York) and Joseph R. Schad (9/15/86—Syracuse, New York); newspaper report re Zelma Schad Hardenburgh, *Syracuse Herald-Journal*; baptism certificate of Robert George Schad (1/18/31—Syracuse, New York); Deptula Decl., ¶ 9.

³⁴ See 1920 U.S. census records—Syracuse, New York.

³⁵ See Deptula Decl., ¶¶ 9-14

³⁶ See Birth certificate of Edward H. Schad (8/24/40—Syracuse, New York); death certificates of John B. Schad (10/23/26—Syracuse, New York) and Edward H. Schad, Sr. (11/7/73—Syracuse, New York).

³⁷ Death certificate of John Schad (10/23/26—Syracuse, New York).

³⁸ See also Lebowitz Decl., ¶ 14 & 47.

³⁹ See Lebowitz Decl., ¶ 14.

⁴⁰ Death certificate of John B. Schad (10/23/26—Syracuse, New York).

40. Edward Sr.'s mother Katherine Elizabeth Hauser was born in 1881 in Erieville, New York and died in June of 1960 in Syracuse, New York. Katherine Hauser had five known siblings; Gertie, Emma, Ida, Edward, and Roswell.⁴¹ Edward Sr.'s mother, Katherine remarried a man named Oliver Roache, sometime after his father passed away.⁴² Edward Sr.'s sister, Katherine M. Schad, was named as Ed Jr.'s godmother; she passed away in May 1984 in Syracuse, New York.⁴³ Ed Jr.'s paternal grandmother Katherine's relationship to Ed Jr. and his parents is discussed later in this declaration.

41. Edward Schad, Sr. and his siblings were reportedly divided into two groups, with a seven-year gap between the youngest of the first group and the eldest of the second. According to family members, the second group was raised somewhat differently from the first. While this is not unusual in large families, the issue which purportedly set them apart was unusual:

Marion Whelan [Ed Schad, Sr.'s youngest sibling] remarked that it sometimes seemed as though there were two distinct sets of children within the one household. Given the range in ages, as well as the 7-year gap between the births..., that did not strike me as surprising. However, what distinguished one group of siblings from the other was not so much age as religion....According to Ms. Whelan, the first 7 children were baptized and raised in the Roman Catholic faith; the youngest three (including both Marion and Ed Sr.) were raised as Protestants. (Deptula Decl., ¶ 10.)

This is confirmed by Mabel herself:

Both [Marion and Mabel] have reported that on Sunday mornings, the Schad children left the house in two groups to attend (separately) their respective churches. Neither Marion nor Mabel found this fact at all unusual... (Lebowitz Decl., ¶ 16.)

⁴¹ See LDS genealogy ancestry file on Schad family.

⁴² See LDS genealogy ancestry file on Schad family.

⁴³ See Death Certificate of Katherine M. McDonald. (5/18/84 - Syracuse, New York)

42. Unlike his wife's family, Edward Schad, Sr.'s family played a much more active role in his children's lives. Ed Jr. and his mother lived with his paternal uncle William Schad for more than a year as an infant then with another uncle for several months while he was in high school; his paternal grandmother, Katherine Schad, babysat for Ed Jr. and his siblings throughout their childhood. Nonetheless, Ed Jr.'s paternal relatives, like his mother, have expressed a reluctance to disclose or discuss family matters:

Ms. [Marion Schad] Whelan stated very early in our conversation that she "doesn't believe in the family tree, because then all the dirt comes out." (Deptula Decl., ¶ 9.)

Immediate Family

43. Edward Harold Schad, Jr. was born on July 27, 1942 in Syracuse, New York. He was the first child born to Mabel Jeanne Cole, a 22-year-old housewife for her brother-in-law, and Edward Harold Schad [Sr.], a 22-year-old clerk at the A&P Tea Company.⁴⁴ Edward Schad, Sr. and Mabel Cole were married in a civil ceremony in Syracuse, New York on December 13, 1941, seven and a half months before the birth of Ed Jr., suggesting the union was one borne out of "necessity." At the time of their marriage, both Edward and Mabel worked as clerks.⁴⁵ It is important to realize that this was a Protestant/Catholic marriage that may have carried some serious repercussions. In the 1940's this would be considered pretty scandalous especially in upstate New York – it was truly a mixed marriage – implicating both religion and social status which most likely affected the way in which Mabel's in-law's viewed her. Most likely Mabel did not

⁴⁴ Birth certificate of Edward Harold Schad, Jr. (7/27/42—Syracuse, New York).

⁴⁵ Marriage certificate of Mabel Cole and Edward Schad (12/9/41 – Syracuse, New York).

get any support from the Catholic Church and this kind of ensuing isolation, ostracism, and hostility from the community would make it more difficult for Mabel to find social supports to halt or otherwise curb the abuse that traumatized the Schad family.

44. In the six years following Ed Jr.'s birth, Mabel had four more children, Thomas Francis Schad, Susan May Schad, and a set of twins, Jerry William and Sherry Jeanne Schad, born when Ed Jr. was 18 months old. All of the Schad children were born in various regions of upstate New York. Apart from a brief stay in California when Ed Jr. was in high school, their childhoods were spent in and around Syracuse, close to the families of both parents.

45. The Schad family moved around quite a bit and appeared to have difficulty finding a stable living situation. This is a likely outcome of Edward Sr.'s severe alcoholism and mental illness that prohibited him from maintaining steady employment. Edward Sr.'s erratic behavior due to his underlying psychosis often led to impulsive decisions that did not benefit the family in any way. As such, Mabel was the only one who maintained a steady albeit low-paying job. The extreme poverty of Schad family may have caused them to move from place to place within the same area. From 1942 until 1948, the Schad family resided at 811 Main Street in Auburn, New York. From 1948 until 1956 they resided at 611 Plymouth Avenue in Mattydale, New York. The family moved to California but returned to New York after just a few months. In 1956 they moved to 200 Melrose Drive in North Syracuse, New York and remained there for about two years. In 1958 they family moved again to a run down farm in Bridgeport, New York.⁴⁶

⁴⁶ Military records of Edward Schad Jr., statement of personal history (11/6/66).

46. The relationship between Mabel Cole and Edward Schad, Sr. was off and on for several years before they married in 1941:

I met...[Ed Schad, Sr.]...at a skating rink when I was a young girl. Edward lived in my neighborhood on the West side of Syracuse, near St. Lucy's Church. When I was fifteen, I began to date Edward off and on...I also knew Edward's younger brother, Bill, and got along well with him.

When I was 18, I got a job at Grant's Department store...At this time, I began dating Edward again. I was living with my aunt at this time and I remember that my aunt did not like Edward at all. She warned me to stay away from him, mostly because Edward and I had dated earlier, Edward had broken up with me to date other girls. (Hughes Decl., ¶¶ 3-4.)

47. As this quote indicates, Mabel Cole had known both Edward Schad, Sr. and his brothers when they were teenagers. At the time of her marriage, Mabel Cole was apparently employed as a "housekeeper" in the home of Edward Sr.'s brother William.⁴⁷ Less than a year later, when Ed Jr. was about five months old, Mabel moved in with another brother, Joseph Schad, who had recently been widowed.⁴⁸ According to Marion Schad Whelan, Edward Sr.'s youngest sibling, Joseph's wife Mary M. Schad suffered a convulsion during childbirth which killed both mother and child.⁴⁹

48. Less than a year after Mabel and Edward Sr. were married, Edward Sr. enlisted in the Army Air Corps. Five days later, Edward Sr. entered active service and two weeks later Ed Jr. was born.⁵⁰

49. Mabel Schad gave birth to the twins Jerry and Sherry on January 31, 1944. It is noted that their father, Edward Sr. was a 23-year-old prisoner in Germany.⁵¹

⁴⁷ See *Polk's Directory—Syracuse, New York (1941-1944)*.

⁴⁸ See Death certificate of Mary M. Schad (11/12/41—Syracuse, New York); Hughes Decl., ¶ 6.

⁴⁹ See Deptula Decl., ¶ 13

⁵⁰ VA Records of Edward Schad Sr.

III. EMOTIONAL/ SOCIAL/PSYCHOLOGICAL DEVELOPMENT

Low Social and Occupational Functioning:

50. In late 1945, about a year after Edward Sr.'s return home, he and his brother, Raymond, opened the Schad Brothers Tire Service in Auburn, New York. They continued running this business until 1950 when Edward Sr. started to work for Holcumb Steel as a shipping clerk. In 1951, the combined annual income for Edward Sr. and Mabel was \$3,600.⁵² In 1952, Mabel started working outside of the home at a low-paying factory job; she was a paint-sprayer on an assembly line for Crouse-Hinds.⁵³ She brought home \$2583.14 for the year and Edward Sr. earned \$3294.37 making the total income for the year, \$5877.51.⁵⁴ Ed Jr. stopped working after 1963 and from 1964 on Mabel was the sole breadwinner of the family.

51. According to Susan Schad, her family lived in poverty so visible that the Schad children felt ashamed and embarrassed:

The children almost never got new clothes, nor did they have the toys or other things that other children had. She recalls that the Schad children's old clothes and lack of possessions made their poverty visible and humiliating. This was especially hard on them around Christmas when they sometimes received no presents at all... (Deptuala Decl., ¶ 4).

Hence, the children were isolated from others who could have had healthy influences on their psychological development.

⁵¹ See Certificate of Birth of Jerry Schad (1/31/44 – Syracuse, New York); Certificate of Birth of Sherry Schad (1/31/44 – Syracuse, New York).

⁵² Social Security Administration records of Edward Schad Sr. Detailed FICA Earnings.

⁵³ Employment Records of Mabel Schad, Crouse-Hind records (1/8/52 – 12/31/81).

⁵⁴ Social Security Administration Records of Edward Schad Sr. and Mabel Schad, FICA earnings.

Infancy and Childhood

52. In 1985, the Yavapai County Probation Department submitted a pre-sentence report to the Superior Court in Prescott, Arizona, including a section entitled "Social History," which began as follows:

The defendant is the eldest of five children born to Mabel and Edward Schad, Sr., in Syracuse, New York. The defendant reported a very stormy childhood, with his father being an alcoholic and abusing the defendant on a regular basis. The defendant stated that his father would beat him with his fist as discipline. The defendant reported that he tried to protect the family from his father's abuse by allowing his father to inflict beatings on him for anger towards other members of the family. The defendant always kept his problems to himself and to this day has not dealt with the feelings he has regarding his life.⁵⁵

My review of the records and my interviews with Ed Jr. reveal that this statement, while accurate, fails to describe fully the chaos and isolation which typified Ed Jr.'s early years.

53. During childhood, the brain is in accelerated development. When trauma is experienced and sustained in early childhood it can have drastic effects on developmental processes. When trauma is perpetuated by someone close to the child, such as a parent or caregiver, prognosis is worse for that child, and this is especially true when the trauma is chronic. Thus, for Ed Jr., the damaging effects of further, ongoing trauma, especially at the hands of parents, would be even more detrimental.

54. Moreover, repeated trauma in childhood forms and alters the personality. A child raised in an abusive environment must find a way to develop trust in caretakers who are untrustworthy, control in a chaotic situation, power in a helpless situation, and safety in an unsafe world, while struggling to create a sense of self where every force is operating to annihilate such internal stability. In other words, such a child is faced with impossible tasks and necessary psychosocial development is precluded in such an

environment. Unable to protect himself and his siblings, Ed Jr. attempted to compensate for the failures of adult caretakers with the only tools at his disposal, an undeveloped system of psychological defenses. Ed Jr.'s mother was not capable of protecting him from his father's abuse.

55. Neglect has been found to have some of the longest term and most pernicious effects of all childhood traumas. The brain is not completely developed when a child is born. The psyche, or the self, is also not completely developed when a child is born. A child's interpersonal experiences and exposure to stress determine the path the development for both neural structures and the development of personality. The absence of care taking or attachment experiences necessary for normal development can alter both the structure and function of the child's brain and exacerbate genetic vulnerabilities. Neglectful families typically do not have any routines for a child to rely on; sleeping, eating, bathing, schoolwork, are not monitored which can affect a child's psychological and physical well being. This lack of structure and routine is another facet of the unpredictable nature of an insecure environment that encourages chronic hypervigilance. It also does not allow normal development of the stress response system and may cause difficulties in the ability to modulate affect and mood.

56. In many cases, the devastating inability of a child to obtain the nurturing he needs through his caretakers may be ameliorated by access to other, alternative caretakers and environments that can provide the safety and stability necessary for cognitive and emotional development to proceed in a near normal fashion. Unfortunately, for Ed Jr., none of these existed when he was young and the damage done

⁵⁵ Presentence Report by Sharon M. Hull, County of Yavapai (Arizona) Adult Probation Department, No. 8752 (8/29/85 sentencing date), p. 3.

early in life was profound and shaped his entire life. It was also unfortunate that the family environment obviated reaching out to sources that might help or buffer the hardships and stressors that the Schad family faced.

Mentally Ill Parents

57. Dr. Lebowitz, in her recent declaration submitted in this case, made the following observations:

Edward Schad, Jr.'s parents were so burdened by psychological and substance abuse problems that neither could parent effectively. Mr. Schad suffered from florid posttraumatic symptoms, as well as severe alcoholism and a psychotic disorder that left him completely disabled, both as an individual and as a [parent]. Further, he tended to act out his illnesses, thereby inflicting his disordered and violent world upon his children in frightening and traumatizing ways.... (Lebowitz Decl., ¶ 51.)

58. I concur with Dr. Lebowitz's findings; Ed Jr.'s parents were substance dependent and extremely mentally ill. The environment in which Ed Jr. was raised included many factors that placed him at high risk. Among these are: a physically disabled and psychologically damaged father by horrific war experiences; an uneducated, unskilled, fairly young mother burdened with full responsibility for several children, some of them quite ill, facing an uncertain future with a husband in a POW camp; isolation in a semi-rural area, with mother and children totally dependent on a mentally ill father for transportation; both parents with substance abuse problems which worsened over time; no medical care for the first five to nine years of the children's lives; economic poverty in a depressed area with obligations of assistance to extremely large extended families. All of these problems were made worse by the family's tendency toward isolation and denial.

59. Edward Schad, Sr. enlisted in the Army Air Corps two weeks before Ed Jr. was born. He entered active service days after his birth and was almost immediately sent into combat in Europe. Except for a brief furlough in 1943, he remained in Europe until 1945. Edward Schad, Sr. served in the United States Air Force as a ball turret gunner on a B-17 bomber. After a year in combat, his plane was shot down at an altitude of 28,000 feet over Schweinfurt, Germany.

60. Years later, he described the experience and his subsequent detention for 18 months in an Austrian prisoner-of-war [POW] camp:

...[O]n August 17, 1943, while on duty on a combat mission in a B-17...I was shot down by flak fighters. I was captured by the civilian police and turned over to the luffwaffe and gestapo. I was taken to a school house and held...while other airmen were captured. About four of us were taken...to a gestapo jail where we were held...and interrogated. At that time we were taken to the Frankfort Interrogation Camp...about 30 miles by automobile. During this period we were given bread and water and a British Red Cross parcel.

About August 25th 90 of us were loaded into boxcars and sent to Mooseburg, a trip of about five days. We traveled at night and were not allowed out of the car during the day. We were fed only bread and water during this trip. I stayed at Mooseburg about three months...We were loaded...once again into boxcars and transferred to Stalag [sic] 17B, at Krems outside Vienna. I was imprisoned here 18 months. During this 18 months I was fed a bowl of soup and bread once a day and issued a water ration. Occasionally I was given potato, carrot or turnips....⁵⁶

Edward Schad, Sr.'s ordeal – physical and psychological – as a POW is discussed in detail by Dr. Lebowitz:

Stalag 17-B held almost 30,000 POW's from several nations. According to recently de-classified military records, conditions at Stalag 17-B were "never good, at times even brutal." In the months after Mr. Schad's arrival, he had his comrades had virtually no food and no eating utensils. The Red Cross provided blankets (so thin that they were known as "tablecloths") for less than of the American prisoners in Stalag 17-B. Mail was routinely delayed for up to four months; writing privileges were suspended indefinitely, compounding the prisoners' sense of isolation. Physical violence by guards was common. Post-war investigations documented severe beatings, numerous killings, no medical care.

⁵⁶ Sworn statement, Veterans Administration records of Edward H. Schad (8/28/47).

American POW" were beaten with rifles, attacked by guard dogs, and literally starved. The Red Cross documented hundreds of Geneva Convention violations, many resulting in death or permanent injury to American prisoners. Military records show that Mr. Schad was held at Stalag 17-B for 18 months. He had the remaining members of his unit had begun the "death march" from Stalag 17-B when they were liberated by Russian troops. (Lebowitz Decl., ¶ 20).⁵⁷

61. Ed Jr. was more than three years old when his father was officially discharged from the service; his brother Jerry (the surviving twin) was almost two and his sister Susan still an infant.⁵⁸ Edward Sr. was 24 years old when he returned home; he had been severely damaged, both physically and emotionally, by his wartime experiences. His wife and sister stated that he returned from World War II "a completely different person," "a changed man." In the years following his return to civilian life, Edward Schad [Sr.] suffered from several conditions which, taken cumulatively, had a profound impact on the development and well-being of Ed Jr.

62. Edward Schad, Sr.'s post-war disabilities include physical injuries and disfigurements, combat-related post-traumatic symptoms, chronic alcoholism, and a severe underlying psychiatric disorder. (Lebowitz Decl., ¶¶ 21-30). Among his physical ailments were a large, unhealed facial wound and an injury to his left foot which was

⁵⁷ As Dr. Lebowitz notes, the conditions of Stalag 17-B and the experiences of the thousands of American POW's detained there are well documented in investigative reports by the International Red Cross, as well as the Department of State, the War Department's Military Intelligence Service, and the liberating armies of both the United States and the Soviet Union. (See Lebowitz Decl. ¶ 20 & fn. 5.) Among those reports are the following: "American Prisoners of War in Germany: Stalag 17B [restricted classification] (7/15/44 & 11/1/45); "Summary Descriptions of Prisoner of War and Civilian Internee Camps in Europe" (6/21/44; 7/28/44; 8/29/44; 8/31/44); Department of State's reports on "Stalag XVII B-Gneixendorf" (1/12/44; 3/15/44; 5/2/44; 5/31/44; 6/16/44; 8/10/44; 10/24/44; 1/17-19/44); "Report of Brutalities of German Guards Against American Prisoners (6/20/44); "Camp Conditions" (War Department—10/27/44); "Violations of the Geneva Convention (Stalag 17-B)"; "War violations" reports (1945-1946); and "Stalag XVII B (American Section)" (International Red Cross—12/14/44).

⁵⁸ See Birth certificate of Susan May Schad (5/8/45—Syracuse, New York).

apparently caused when he landed on concrete after parachuting into Nazi Germany.⁵⁹

Reports with respect to the facial wound are inconsistent. A 1952 report states:

He gives the history that when he parachuted at an altitude of about 28,000 feet, he was using a small chest pack. The descent was very rapid and the shrouds ripped across the right side of his face, laying open the skin...⁶⁰

Family members, on the other hand, believe the wound was caused by Nazi attack dogs:

[Marian Schad Whelan] described a severe scar on his face almost an inch long, which never fully healed. Every year the scar "leaked." The scar, she said, was caused by dog claws. He [Ed Schad, Sr.] had told her that in the German POW camp where Ed Schad Sr. was held, the guards "sicked the dogs" on Ed and other American prisoners. (Deptula Decl., ¶ 12.)

63. Marian Whelan also described her brother as "all crippled up with arthritis" in the years following his return. (Deptula Decl., ¶ 12.) He sought frequent medical attention for these conditions as well as chronic headaches, stomach ailments, and a range of other conditions which he attributed to the deprivations and hardships of his years as a POW:

While I was imprisoned I lost approximately 30 pounds, suffered dysentery and scabies. Since my discharge I have suffered from insomnia, loss of appetite and have become irritable and nervous.⁶¹

Evaluations from 1945 consistently note these symptoms, as well as tension, restlessness, chronic anxiety and "anxiety attacks," tremors and "shakiness," "desperation,"

⁵⁹ See Evaluation by William L. Schiffman, M.D. (6/13/52), Veterans Administration records of Edward Schad, Sr. All of the medical reports and evaluations discussed in this section are contained in the Veterans Administration [VA] records of Edward H. Schad, Sr.

⁶⁰ Evaluation by William L. Schiffman, M.D. (6/13/52). VA records refer to his facial wound as a "trauma to the right cheek" and, later, simply a "disfiguring scar." See Schiffman evaluation; Rating Decision, Syracuse Veterans Administration Hospital (4/24/70).

⁶¹ Sworn statement of Edward H. Schad (4/28/47).

nightmares and other sleep disturbances, physical fatigue, anorexia, weight loss, nausea and vomiting.⁶²

64. These are physiological manifestations of psychological distress, classic symptoms of post-traumatic stress. His military and VA records confirm that Edward Schad, Sr. did indeed suffer a severe stress-related condition rooted in his wartime experiences:

...POW 22 months...Upon return to US learned that baby died and wife ill. Began to experience persistent morning nausea and vomiting along with episodes of 'shakiness.' Delayed reaction from prolonged stress, aggravated by acute familial situation.⁶³

...22 months as a POW; physical privations were great...On being released, he began to notice symptoms of anxiety. He became very irritable and now wants to 'forget.'⁶⁴

His psychiatric diagnoses upon discharge were:

- (a) Anxiety reaction, chronic, mild, manifested by tension, restlessness, insomnia
- (b) Stress, severe, bailout, POW 22 months.⁶⁵

In the year following his discharge, his diagnoses included "Combat stress-severe," "Anxiety state, chronic, severe, with conversion symptoms...due to combat and prisoner status" and "Psychoneurosis, anxiety state, caused by experiences in combat."⁶⁶ He was found eligible for disability benefits based on "Anxiety Neurosis...incurred in service."⁶⁷

65. Soon after Edward Sr.'s return from the war, Mabel realized that he was a different person:

⁶² See Personality Estimate by A.J. Kaplan, Major, MC, Psychiatrist (8/4/45); Examination by Philip Briscoe, M.D. (9/5/45); Report of Physical Examination Of Enlisted Personnel Prior to Discharge (10/3/45).

⁶³ Kaplan Personality Estimate, *supra*.

⁶⁴ Examination by Philip Briscoe, M.D. (9/5/45).

⁶⁵ Report of Physical Examination Of Enlisted Personnel Prior to Discharge (10/3/45).

⁶⁶ See Kaplan Personality Estimate, *supra*; Physical Examination for Flying (8/6/45); Letter from J. David Hammond, M.D. (4/28/47).

⁶⁷ Rating Sheet (4/29/46).

He was no longer the man I married...He has lost a lot of weight and looked very unhealthy. He screamed in his sleep all the time. He was in a lot of pain and full of terrible memories which he couldn't seem to escape. I know that he was tormented because of the nightmares and the screaming, but I know very little about what actually happened to him in Stalag 17-B. He did not share those details and I did not ask for them. (Hughes Decl., ¶ 11.)

66. By all accounts, Edward Schad, Sr.'s combat-related condition was severe and debilitating. The effects of that condition were exacerbated by alcoholism and an underlying psychiatric disorder, both of which were evident while Ed Jr. was still a young boy. His alcohol problem quickly became so severe that he was unable to hold a job or support his family. Mabel Schad [Hughes] attributes her husband's drinking to his wartime experiences:

Edward was not a drinker before he went into the service but when he returned, he drank a lot and often lost his temper and became mean...Edward tried painting houses to earn some money but that didn't work out wither. He often went to work drunk and had trouble completing the jobs he had...Usually, after Edward finished a painting job, he stayed home for weeks just getting drunk....

67. The extent of his drinking is described by both Mabel and Susan Schad, Ed's younger sister:

Finally, Edward gave up on holding a job and drank...[He] drank almost every day. His drinking often lasted for weeks at a time. Eventually, he would get too sick to keep drinking, or at least to get to the pub, and for a few weeks after that he would stay in the house. (Hughes Decl., ¶¶ 12; 17-20.)

[Susan] stated that he stayed shut up in his bedroom for days at a time, drinking until he became physically sick. (Deptula Decl., ¶ 5.)

By 1970, his records documented a "20 year history of heavy drinking" and diagnoses of "excessive alcoholism" and "Alcohol paranoid state."⁶⁸

68. During the same period, coinciding with Ed Jr.'s childhood and adolescence, Edward Sr. became increasingly paranoid and delusional. Although family

members suffered the consequences of his thought disturbance – most notably his paranoia, social withdrawal and unpredictable violence – for many years, it went largely untreated until 1970, when Edward Sr. was institutionalized and treated with high doses of Thorazine, an antipsychotic.⁶⁹ By that time, he suffered from active auditory hallucinations, bizarre thought distortions, and persecutory delusions. In the last years of his life, he was diagnosed with Paranoid Psychosis, Organic Brain Syndrome, Chronic Undifferentiated Schizophrenia, and “Psychosis with organic brain syndrome of unknown etiology.”⁷⁰ Complicating this mental illness, Edward Sr. also suffered substance use disorders and was alcohol dependent. By his own admission, he drank up to a case of beer a day. Mental health professionals have for some time recognized that adequate treatment of co-occurring mental illness and substance use disorders requires that both be treated concomitantly, especially in the cases where mental illness is clearly apparent. Substance abuse can be an attempt to “medicate” the mental illness—albeit feeble and ineffective. It also can worsen or prolong the mental illness. It is clear from his medical records that Edward Sr. needed help for both problems. Unfortunately, he did not get the help that he needed.

69. Edward Sr. had other medical problems. On his Veterans Administration claims form he reports that he suffered a head trauma when he was three years old that resulted in lacerated occiput. He had a tonsillectomy and adenoidectomy in 1928 and at eight years of age he suffered from some kind of blood poisoning.⁷¹

⁶⁸ See VA Hospital Summary by John J. Danchy, M.D. (3/2/70); VA report by Wildred L. Pilette, M.D. (3/24/70); VA Hospital Summary by Thomas M. Walsh, Ph.D. and G.B. Ewing, M.D. (4/15/70).

⁶⁹ See Pilette evaluation, *supra*.

⁷⁰ See Pilette evaluation, *supra*; Danchy Summary, *supra*; VA Exchange of Beneficiary Information (4/3/70); Walsh & Ewing Summary, *supra*; Clinical Record by W.F. Knoff, M.D. (6/24/71).

⁷¹ VA Medical Claims File of Edward Schad Sr., Syracuse VA Hospital Summary, medical history (2/10/70 – 3/20/70).

70. Edward Sr. was limited in his education; he attended only one year of high school. His limited education may have made it more difficult for him to provide a stable environment for his family, and also for seeking adequate help from outside resources.

71. On the employment section of his VA claims forms, Edward Sr. stated that he was unable to work currently because of his nerves but that he had worked in the past. He worked as a truck driver for two years; a shipping clerk for a furniture company for six months; a window washer for one year; a grocery clerk for A&P for three years; a shipping clerk at Holcumb Steele. Edward Sr.'s mental illness and his severe alcoholism kept him from maintaining a steady job.

72. Another example of Mabel's inability to deal with what was going on at home was her denial to VA doctors that Edward Sr. exhibited abnormal behavior before his hospitalization in 1970. As discussed above, this was part of the pathology of the family system that obviated intervention to anyone member who was suffering mental illness. In fact, Edward Sr. exhibited severe symptoms of mental illness. He was admitted when he began to display bizarre and delusional thoughts; he believed the vacuum cleaner was bugged and took it apart to show the family the microphone. He developed illusions of persecution, accompanied by fear; he piled trash on the floor, ripped the phone off the wall, threatened violence to the family and threatened to burn the house down.⁷² The clinical psychologist who spoke with Mabel stated that "in spite of the Schad family members' insistence that he was okay until recently, there is evidence to the contrary."⁷³ This denial of Edward Sr.'s long-standing history of mental illness

⁷² VA Medical Claims File of Edward Schad Sr., Syracuse VA Hospital Summary, John J. Danchey, M.D. (3/20/70).

⁷³ VA Medical Claims File of Edward Schad Sr., Syracuse VA Hospital Summary, Thomas M. Walsh, Ph.D., Clinical Psychologist (4/21/70)

provides a clear example of the motivation that no one outside the family could know what was really going on within the Schad household.

73. Given Edward Schad, Sr.'s traumatic history coupled with his severe substance use disorders and mental illness, the poor level of functioning within the Schad home life is not surprising given this pathological environment. The family environment derailed normal developmental processes and Ed Jr.'s upbringing gave no room for him to develop an individual identity. As in many families of parents who have lived with the effects of abuse and alcoholism, emotions were pathologically expressed (e.g., extreme and erratic) and responses to minimize and deny were encouraged and shared among the family members. Affection—critical for providing a sense of safety and security needed for normal development—was absent. In its place, control through physical and verbal abuse dominated. The effects of their abusive and alcoholic family took their toll on the Schad children in visible and penetratingly deep ways. Their mentally ill functioning debilitated Edward Sr. and Mabel from responding to their children in caring and supportive ways.

74. Mabel Schad also suffered from marked emotional problems, albeit of a different nature. Depression, despondency, and substance abuse were part of the picture. Dr. Lebowitz, who interviewed Mrs. Schad [now Hughes], found the following:

Whereas Mr. Schad's impairments are readily recognizable and clinically well documented, Mrs. Hughes's impairments, though equally important, are somewhat more subtle, at least in terms of the record. Mrs. Hughes suffered from a level of emotional and psychological detachment that is clinically significant and sufficiently extreme as to endanger her children physically, as well as psychologically. (Lebowitz Decl., ¶ 37.)

When she discussed Mabel Hughes's "profound detachment," as well as her secrecy with respect to her own history, Dr. Lebowitz noted the following:

Asked about her own health while her children were young, Mrs. Hughes specifically denied any illnesses or medical conditions, except for one injury at work. That...is belied by documentary evidence. Her employment records show that between 1959 and 1982, Mabel Schad sought medical attention almost monthly, during which time she was repeatedly prescribed Darvon, Percodan and Emagrim for pain⁷⁴ caused by numerous serious (and in some cases, somewhat suspicious) physical injuries... (Lebowitz Decl., ¶ 49.)

75. As the above quote suggests, Mrs. Schad's emotional disabilities were apparently coupled with, and likely exacerbated by, frequent use of prescription medications:

When she felt "nervous" or experienced "family problems," her doctor prescribed Phenobarbital. Chronic narcotics use likely fostered and exacerbated Mrs. Hughes's inability to focus on her family in a normal way. (Lebowitz Decl., ¶ 50).

76. Dr. Lebowitz concluded that Mabel Schad's emotional disturbances left her significantly compromised:

The combination of narcotics use and psychological problems seems to have left her unable to attend to their emotional or, at times, even basic physical needs. (Lebowitz Decl., ¶ 50.)

77. By her own admission, Mrs. Schad/Hughes sometimes turned to alcohol as a means of escape from overwhelmingly difficult realities. For example when Ed Jr. brings Wilma and her kids to visit his mother after his first incarceration in Utah:

...I was shocked to see him with a girlfriend like Wilma. Wilma was just filthy. She looked like she had never washed her hair. Her children were also very dirty...Although we were planning to go to a relative's house the next day for dinner, I decided that I could not stand it and started drinking. I got very drunk and then went into my bedroom and called for Bill. When Bill came in, I told him to get rid of all of them, just get them out of the house. I then went to bed. I don't know what Bill said to them, but Ed Wilma and the children left. I don't know where they went. I never saw Ed again. (Hughes Decl., ¶¶ 34-35.)

⁷⁴ The medications mentioned by Dr. Lebowitz are narcotic (or "opioid") analgesics with a strong potential for addiction.

These conclusions are consistent not only with the records I reviewed,⁷⁵ but also with reports by other family members. (See Johnson Decl., ¶ 10; Deptula Decl., ¶ 6.) They were also confirmed during my interviews with Ed Jr.

Medical and Emotional Neglect

78. In January of 1944, while Edward Schad, Sr. was still a POW in Nazi-occupied Austria, Mabel Cole Schad delivered twins, Jerry and Sherry Schad.⁷⁶ Ed Jr. was 18 months old when Mabel became (effectively) a single mother of three. Her daughter Sherry was reportedly the elder and healthier of the twins. Mabel believed at the time, and reports today, that both infants were developing normally. She saw no cause for alarm:

While Edward was in the Nazi prison camp, I gave birth to twins, Jerry and Sherry Schad. They were born on January 30, 1944. From the moment they were born, I believed Sherry was the stronger of the two babies. (Hughes Decl., ¶ 9.)

Mabel's sister-in-law also reports that Sherry was the larger of the twins, but she was apparently quite ill. She was less than one month old when she died.⁷⁷

79. Mabel's account of her daughter's death is as follows:

[S]hortly after I returned from the hospital, a visiting nurse from the Red Cross came to check on my babies. Examining Sherry, the nurse told me to take Sherry to the hospital right away because Sherry was dying. I couldn't believe it because she seemed fine to me, but my brother-in-law, Joe, and his sister took her to the hospital. Sherry died the very next day. I don't know exactly why she died but I believe that the hospital was to blame for Sherry's death because Sherry had a little purple circle on her heel where it had rubbed against the hospital sheets. I heard later that the hospital sheets were not washed well and that caused an infection in Sherry which caused her death. (Hughes Decl., ¶ 9.)

⁷⁵ See Medical records of Mabel Schad, Crouse-Hinds (1952-1981).

⁷⁶ Birth certificates of Jerry William Schad and Sherry Jeanne Schad (1/31/44—Syracuse, New York).

⁷⁷ Death certificate of Sherry Schadd [sic] (2/27/44—Syracuse, New York).

80. Here again, her account differs somewhat from other reports: “It was Marion [Ed Sr.’s sister] who recognized that Sherry was ill and who took her to the hospital where she died a few days later.” (Deptula Decl., ¶ 13.) The cause of death listed on Sherry Jeanne Schad’s death certificate is “Dehydration, Diarrhea Due to Malnutrition.” Sherry suffered from dehydration for the last five days, and from diarrhea and malnutrition for the last ten days of her life.⁷⁸ Mabel’s poor level of functioning is evidenced by the disjuncture between the death report of Sherry Schad and her own account of her daughter’s death which is indicative of her inability to accurately assess the severity of the situation and the role that she may have played in her daughter’s death.

81. Sherry Schad’s death is a tragic example of the neglect suffered by the Schad children throughout childhood and adolescence. Dr. Lebowitz notes that:

Mrs. Hughes’s profound detachment was evident with respect to many... significant facts concerning both herself, her husband and her own family. Mrs. Hughes reports knowing nearly nothing about her children’s day-to-day lives and their major developmental experiences.... There is evidence that at times her disengagement had dire consequences for her children. (Lebowitz Decl., ¶¶ 48-49).

The circumstances surrounding Sherry’s death are the first of nearly a dozen examples cited by Dr. Lebowitz to illustrate Mabel Schad’s detachment from her children:

Mrs. Hughes told me quite frankly that her children did not receive regular medical attention. She felt that there was no need for them to see a doctor, as they were never really sick. As noted above, her children were indeed very ill. Sherry Schad... was hospitalized after a visiting nurse recognized that the child’s death was imminent. Mabel had not noticed her condition. (Lebowitz Decl., ¶ 49).

82. Another example of both Mabel’s detachment and serious medical neglect was the family’s failure to identify one of their son’s serious eye defect: “Jerry Schad was, from the time of his birth, almost totally blind in one eye.” (Lebowitz Decl., ¶ 49.)

⁷⁸ Death certificate of Sherry Schadd [sic] (2/27/44—Syracuse, New York).

Despite the severity of his condition, it went unnoticed and untreated until discovered by a school nurse when Jerry was seven or eight years old. The family reports this tragedy, and the family's ignorance of their son's disability, seemingly without thought to their own failure, as seen in Marian Schad Whelan's report:

The remaining twin, Jerry, was "born with one bad eye," but the family did not know it until he began school. Marion was told that his eye was "never fully formed." (Deptula Decl., ¶ 14.)

The eye was surgically removed before Jerry reached adulthood.

83. Failure to notice Sherry's life-threatening illness and Jerry's near-blindness are both part of a pattern of neglect that extended to the area of not recognizing abnormal development and mental illness. Mabel and Edward Sr. showed a level of disinterest in their children coupled with a striking lack of affection that seriously thwarted the emotional development of the children. For Ed Jr.'s sister Susan, that lack of affection was so great as to define her children:

When asked about her childhood, two factors seemed extremely vivid to her. The first was her father's drinking... The other aspect was that both parents (Mabel and Ed Sr.) were extremely emotionally distant toward each other as well as their children. She reported that neither parent showed affection of any kind to her, Ed or the other boys. As a child, she neither witnessed nor experienced physical contact or comfort. Only as an adult, when she became a mother, did she become aware of a child's need for basic comfort and nurturing. (Deptula Decl., ¶¶ 5-6.)

Their emotional deprivation was so great that Ed Jr. and his siblings grew to adulthood unaware that, for other children, childhood included basic physical comfort and reassurance:

Susan Schad... stated that when her first child was born, she knew how to feed her and change her diapers but was totally unaware of an infant's basic emotional needs. Her mother-in-law had to instruct her on how to hold her baby, rock her and soothe her. Prior to this instruction, Susan said that the only time she thought the baby needed to be touched was during diaper changes and feedings. (Deptula Decl., ¶ 6.)

Response to Stress and Mental Illness: Abandonment/Rejection/Scapegoating

84. The lack of affection described by Susan Schad was particularly severe with respect to Ed Jr., and particularly in the case of his father.

I always felt very sorry for Ed Jr. It was clear that he so desperately wanted his father's love, but for some reason, Ed Sr. never gave him that. I never knew why, but I saw Ed Sr. treat Ed Jr. differently from the other children. (Johnson Decl., ¶ 10.)

As the above quote indicates, Ed Jr. was singled out by his father for particularly harsh treatment. His aunt states, quite bluntly: "It was obvious to me that Ed Sr. did not like Ed Jr." (Johnson Decl., ¶ 10.)

85. Ed Jr.'s early years of childhood trauma left him scarred and vulnerable to chronic mental illness. Life at home was chaotic, unpredictable, and damaging, involving constant struggle and disharmony between his parents. His father, Edward Sr., was so psychotic that he psychologically, physically, and emotionally abused Ed Jr., his mother, and his three siblings. The physical and psychological assaults on Ed Jr. were relentless and this chronic abuse of him and his siblings eventually and tragically changed all areas of development for Ed Jr. Because of Edward Sr.'s own traumatic experiences from the war, his mental illness, paranoia, and alcoholism he became sadistic, and used vicious methods of control and dominance to bring havoc on Ed Jr.'s cognitive and emotional functioning. Edward Sr. persistently assaulted Ed Jr.'s psyche, stunting his ability to regulate his affect and his ability to respond to stressful situations which increased his developing mental illness. This ultimately left Ed Jr. incapable of understanding, processing, or developing healthy relationships with peers and family members. The

continuous abuse and threats often resulted in severe physical injuries as well as psychological damage.

86. Ed Jr. witnessing the extreme assaults from his father upon his mother only exacerbated his internalized belief that he was the cause of the conflicts between his parents and further evoked symptoms of significant psychological dysregulation, including PTSD and mood disorders. The internalization of false guilt is clinically predictable in victims of ongoing abuse and results in alterations in their interpretation of the world, relationships, and themselves. In an attempt to master their environment, individuals like Ed Jr. often come to believe that their actions cause not only the abuse directed at them but also the abuse directed at others. Thus, it is not unusual for them to take responsibility for those acts and circumstances are far beyond their control. Such psychological adaptations, especially when coupled, as it is here, with the belief that appeasing adults will stop the abuse, put Ed Jr. at extraordinary risk for assenting to things that were not his responsibility and feeling further diminished and guilty in the face of this process. For Ed Jr., his need to master his world in the face of daily stress and anxiety often placed him inappropriately in the caretaker role – a role for which he was very ill equipped to handle.

87. Very early on, Mabel Cole's relationships with her future husband's brothers had raised questions regarding Ed Jr.'s paternity. When I asked him about his parents, Ed Jr. disclosed that, while growing up, he "always" believed that one of his paternal uncles was his biological father. When asked to explain, he reluctantly described himself as "illegitimate" (his word). He reported that "I've tried to figure out who I am," but his relatives were evasive when confronted. For example, his aunt

Marian Whelan refused to answer him specifically, telling him only that he “didn’t look like Ed [Sr.]” This report is consistent with that contained in his 1985 PSR:

At the early age of seven the defendant’s father told him he wasn’t his son but the defendant just pushed the comment aside by rationalizing that it was just “beer talk.”⁷⁹

The author of that report correctly notes that Ed Jr.’s response was a psychological defense to his father’s cruel announcement. Although he may have “pushed the comment aside” for the moment, his father’s words, whether true or not, constituted a rejection from which Ed Jr. has never recovered.

Extreme Family Stress: Domestic Violence and Physical Abuse

88. The 1985 PSR, quote above, describes a violent and unpredictable household. That mirrored a similar report in 1979, which indicated that “his father was an alcoholic and he when the father was intoxicated he would physically abuse his children and wife.”⁸⁰ Ed Jr.’s mother confirms these reports and provides details:

During our marriage, Edward used to hit me in the face and head. He accused me of seeing other men. I often went to work with visible injuries, like a fat lip and black eyes. I told my girlfriends and my boss about the beatings. My boss advised me to leave Edward, but I just couldn’t do it. I had four children and I didn’t want to break up the family.

We had many bad fights, sometimes in front of the children, but one night in particular stands out in my memory. One of my girlfriends was over at the house and I had made a spaghetti dinner for Edward and the children. Edward was drunk and began accusing me again of seeing other men. He got furious and totally irrational, then kicked over the table filled with food and dishes. The food and dishes went everywhere. The kids and I were terrified. (Hughes Decl., ¶¶ 21-22.)

⁷⁹ 1985 PSR, *supra*, p. 3.

⁸⁰ Presentence Report by Jay R. Bradshaw, County of Yavapai Adult Probation Department, Case #8752 (11/2/79 sentencing hearing), p. 11.

89. Mabel Schad's reference to "visible injuries" is supported by her medical records, which include treatment for a series of suspicious injuries. In almost every case, Mrs. Schad reported the cause of her injury as work-related, including the following:

Muscle strain attributed to "using the spray gun on the conveyor";
First- and second-degree burns when a "gas stove blew up in my face";
Lacerations after a "rivet machine struck my thumb";
Contusions when she "fell backwards over skid [an industrial container]";
Second-degree burns on her breast when a "hot stone fell down my blouse"; and
Emergency Room treatment for lacerations after falling down a flight of stairs.⁸¹

90. As noted above, Ed Jr. often assumed responsibility and took the punishment (or abuse) intended for others – specifically his mother and younger siblings – even as his father scapegoated him:

I never knew why, but I saw Ed Sr. treat Ed Jr. differently from the other children. I saw him strike Ed Jr. one time during an incident I still remember vividly. The incident still haunts me. Ed Sr. was attempting to take a picture of his children sitting on a fence. Ed Sr. walked over to Ed Jr., who was about 8 to 10 years old. Ed Sr. said something to Ed Jr., and then Ed Sr. raised his arm high and slapped Ed Jr. hard across the face. It was awful. Ed Jr. jumped off the fence and ran away crying. It was obvious to me that Ed Sr. did not like Ed Jr. I was so upset by Ed Sr.'s actions, and Mabel's lack of reaction, I immediately went and sat in the car and waited for Francis outside. I no longer wanted to see Ed Jr. cry.
(Johnson Decl., ¶ 10.)

91. Ms. Johnson's account is striking in several respects. It confirms the reports by Ed Jr. and other family members not only that Edward Sr. was physically abusive, but also that Ed Jr. was singled out for particularly harsh treatment. It also underscores Mabel Schad's "lack of reaction" and is suggestive of a helpless or depressive state.

I never saw Mabel do anything to protect Ed Jr. from Ed Sr.'s cruelty. When Ed Sr. hit Ed Jr. that one time, I recall seeing Mabel turn away and go inside, as if embarrassed or ashamed. But she did nothing to protect her son...Mabel never said a thing. She always seemed very detached from her children. (Johnson Decl., ¶ 11.)

⁸¹ Employment records of Mabel Schad [Hughes], Crouse-Hinds (1952-1981).

92. In addition to dealing with the wrath of his father's alcohol binges, Ed Jr. learned to hide his father's drinking from others. Ed Jr. often finished jobs for his father when he was too inebriated or too psychotic to finish himself. Ed Jr. also became responsible for getting his father home after one of his many drinking binges. In hiding his father's alcoholism Ed Jr. was coached to not only hide the pathology but actually to collude in the pathology which in turn made him feel even more responsible for abuse and his feeling that his abuse was somehow deserved. This collusion likely added a layer of guilt to the shame that Ed Jr. felt and further precluded him from crying out for help that he so desperately needed.

93. For Ed Jr., his mother's indifference to the abuse from his father was particularly painful. Mabel's decision to stay with a man in spite of the horrendous physical abuse inflicted upon her and her children gives grave testament to her psychological imbalance. Mabel's choice of her abusive husband over her children evidenced her own maladaptive upbringing as she signaled to her children, and especially Ed Jr. who received the brunt of the abuse, that not only were their needs were unimportant— a message that profoundly affects the development of a child's psyche — but also that the abuse they suffered was somehow deserved. In Ed Jr.'s case, this latter message was acutely felt because he became the central target and the one blamed for the family's dysfunction.

94. Ed Jr. internalized this message and it governed his responses and choices throughout his life; he believed himself to be responsible or tried to take responsibility and blame for things over which he had no control. His mother's failure to protect him, or even to acknowledge the abuse, conveyed the message that Ed Jr. was not worth

protecting and was responsible for the terrifying abuse that befell upon him and his family. As a result, his sense of self and any feeling of self worth or agency were irreparably damaged.

95. Ed Jr. experienced high levels of stress growing up in his chaotic and disorganized family. The chronic stressful events endured as a child shatter one's basic belief that the world is a safe place. Stressors develop into trauma when they turn into an overwhelming threat that jeopardizes one's belief that the world is a safe and secure place and that one can trust and predict the behaviors of loved ones.⁸² Ed Jr. lived in an environment that disallowed him to make sense of his traumatic experiences.

96. Ms. Johnson has suggested that Mabel was too frightened to intervene on Ed Jr.'s behalf: "Ed Sr. was very domineering. He probably threatened Mabel not to disobey him or stand in his way." (Johnson Decl., ¶ 11.) For many complicated reasons, Mabel Schad failed to protect her young son from the onslaught of ongoing violence by his father and did not intervene in Ed Jr.'s psychological and developmental problems.

97. The beatings Ed Jr. received from his father continued throughout his childhood and adolescence, culminating in what he described as "the worst beating of his life." This statement makes eminently clear the profoundly negative response to reaching out for help in an appropriate manner:

The defendant stated that at age seventeen he tried to commit his father to the V.A. Hospital for treatment. He stated that his father was out of control due to alcoholism. When the officials came to pick up his father, the defendant's mother changed her mind and took sides with her husband. The defendant stated that when the officials left he experienced the worst beating of his life. The defendant described his decision to commit his father as the hardest thing he ever did in his life.⁸³

⁸² Mash and Barkeley (2003). *Child Psychopathology*. New York: The Guilford Press. 330-371.

⁸³ 1985 PSR, *supra*, p. 4.

This incident includes many of the themes which were consistent throughout his development: his father's alcoholism and unpredictable violence, his mother's apathy towards him and her implicit role in his abuse, and Ed Jr.'s internal torment as he tried to reconcile his loyalty to his father with his need to protect both himself and his family. Most importantly, it shows how collusion and denying the extent of the severe problems were reinforced.

98. The story of Ed Jr.'s attempt to have his father committed for treatment is striking, not only for the reasons stated above, but also because it foretold a similar event which occurred in 1970, when Edward Sr. had become so violent and psychotic that his wife and son (in this instance, Jerry) did in fact have him committed:

At times, Edward just went out of his mind. I remember one night when I was sitting in a chair, just watching TV, with Edward behind me. Suddenly all the lights went out. When I turned to see what was happening, I saw Edward standing with one hand on the light switch and a large butcher knife in the other. He started flicking the lights off and on, and laughing in a really bizarre and frightening way. I was very worried and remember wondering, "Is he going looney again?" I asked him what was going on, but he just laughed. I felt totally helpless so I started saying "Hail Marys" and "Our Fathers." Just then the telephone rang and I picked it up. It was Edward's sister, Kate. By this time, Edward's family knew that he had these strange episodes, and Kate could tell by my voice that Edward was acting up again. Kate called our son Jerry and told him to get to our house right away. Jerry was a stocky young man and could really handle himself physically. In fact, Edward was afraid of Jerry. Jerry came over and (Hughes Decl., ¶ 24.)

99. The VA records of Edward Schad, Sr. confirm that in January of 1970, and again in March and April, he was committed to VA hospitals after his alcoholism and psychosis made him far too violent to remain at home:

In late January 1970, he developed illusions [sic] of persecution. These were accompanied by fear and his reaction to this was a toxic one; that is, he piled trash on the floor, ripped the phone off the wall, threatened violence to his family and threatened to burn the house down. When he was admitted to the hospital the most notable thing about him apparently was his irritability and insistence on

leaving. He went home a couple of times and was with difficulty returned to the hospital, finally leaving on 3-2-70 and refusing to return at all....⁸⁴

He began complaining that the telephone was tapped, that people were watching him through the windows, and that people were following him...He became bizarre and inappropriate, thumbing his nose and his wife, picking up buttons constantly. He became loud and threatened violence to his family. He threatened to burn the house down...He was treated with Thorazine 50 mg. b.i.d. which was increased to 50 mg. q.i.d....⁸⁵

Edward Schad, Sr. was diagnosed with Organic Brain Syndrome, "Alcohol paranoid state," and Schizophrenia.

100. It is probably impossible to determine, at this late date, the precise nature of Edward Schad, Sr.'s illness(s), but the specific diagnoses are not particularly significant. What is significant, however, is that Edward Sr. was considered to suffer from a mental disorder characterized by grossly disturbed thought processes, as well as irrational, unpredictable, and potentially violent behavior. If indeed his psychiatric condition was compounded by alcohol abuse, the risk of violent, terrifying acting-out would likely be substantially increased and less easily controlled. Edward Sr.'s VA treatment records suggest that his condition was longstanding:

In spite of Mr. Schad's family members' insistence that he was okay until recently, there is evidence to the contrary. He was given a 10% SC [service-connected] rating for nerves when discharged from the service and admits to a long history of excessive alcoholism.⁸⁶

101. Upon incarceration in Utah State Prison, Ed Jr. commented on his relationship with his father:

He was never able to get along with his father. They would always argue. He describes his father as a very heavy drinker who would get drunk and lay around the house for two or three weeks at a time.⁸⁷

⁸⁴ Hospital Summary by John J. Danehy, M.D. (3/2/70).

⁸⁵ Evaluation by Wilfred L. Pilette, M.D. (3/24/70).

⁸⁶ Hospital Summary by Thomas M. Walsh, Ph.D. & G.B. Ewing, M.D. (4/15/70).

⁸⁷ Edward Schad Jr. Prison Records, Utah State Prison Admission Summary, page 2 (date??)

102. It is not uncommon for families to recognize the substance abuse problems and ignore the co-existing mental illness. To acknowledge Edward Sr.'s severe and debilitating mental illness would have been more frightening and stigmatizing than the alcoholism. Clearly, Edward Sr. was suffering from both a mental illness and a substance abuse problem; the comorbidity of the two is extremely common as one tries to self-medicate to escape the pain of the ensuing mental illness.

103. Edward Sr.'s continued mistreatment of his son had the ongoing effect of depriving Ed Jr. of the developmentally necessary attachment and care needed for optimal psychological and neurological development. His attacks were not only physical but mental in nature which proved to deny Ed Jr. a sense of self, self esteem or self worth, and also have dire consequences later on as their denial, their own dysfunction, and the systemic demonization of Ed Jr. would lead to their abandonment of him throughout his life. This was evident at times when he desperately needed his caregivers to come to his aid and provide him protection including at the time of his arrests.

Social Isolation

104. From a very early age, one of the most damaging aspects of Ed Jr.'s childhood was the degree of social isolation he experienced. The isolation was both social and emotional imposed – both directly and indirectly – by both parents. Edward Sr. and Mabel Schad were not only secretive and paranoid individuals, but were also emotionally disabled and withholding parents. Ed Jr. was painfully aware of this dynamic, as was revealed in his 1985 reports to an investigating probation officer:

The defendant [Ed Jr.] stated that in addition to the abuse his father would never allow him to socialize with others; consequently, the defendant was a very shy, withdrawn adolescent.⁸⁸

In the same report, he referred to his life-long sense of isolation when discussing his friends:

“[H]is friends, Frank and Janet Bramwell, are the family he never had. They accept him and he feels comfortable talking with them and discussing problems. Mr. Schad felt as if he were standing alone most of his life and finally feels comfortable with friends of his own age group.”⁸⁹

105. Sadly, it is inconceivable that the alienation and utter lack of companionship that characterized those early years – the deeply ingrained sense of being unwanted and alone – could be remedied by more healthy, stable relationships decades later. His sense of himself as useless and inconsequential, and his role vis-à-vis other individuals and/or a larger community, had been so deeply etched into his perceptions and his behaviors that his ability to develop real trust or belief in himself had likely been crushed many traumatic years before he even reached adulthood.

106. Ed Jr.’s impairment was evidenced by the inability of Edward Sr. and Mabel to participate in familial relationships in a mutual or constructive fashion. Both of them appeared to lack problem solving skills and abilities to build a financially secure and interpersonally stable family. Their deficits in psychosocial resources would be predicted from their own childhoods, their mood disorders, and generally their poor level of functioning.

Middle Childhood

⁸⁸ 1985 PSR, *supra*, p. 4.

⁸⁹ 1985 PSR, *supra*, pp. 7-8.

107. Ed Jr. attended Mattydale Elementary School from Kindergarten until he graduated in 8th grade in 1956.⁹⁰

108. Ed Jr. was neglected throughout his entire childhood as no competent adult ever attended to Ed Jr.'s basic needs. Ed Jr. reported that he never brought any friends over to his house and his mother Mabel confirmed this.⁹¹ This form of isolation is commonly seen among individuals who are raised in disordered and chaotic families who extend their inability to trust and develop relationships outside of the family.

Adolescence: Disruption and Instability

109. In 1956, Edward Sr. impulsively decided to sell the family home in Mattydale and move his family clear across country to Fullerton, California, apparently to be close to his brother Bill. According to family history, this decision came about after Edward Sr. got fired from the steel mill because of his excessive drinking. While out in Fullerton, Ed Jr. attended 9th grade at Fullerton Union High School; he entered school on September 12, 1956, only to withdraw on November 26, 1956 when the family moved back to Syracuse.⁹² Edward Sr. worked as a laborer in California but did not last for more than a few months before the Schad family returned to the Syracuse area. From 1956 until 1958 they resided at 200 Melrose Drive, North Syracuse, New York.⁹³

110. In December of the same year, 1956, Ed Jr. enrolled in 9th grade at North Syracuse Central High School. During his next school year, Ed Jr. was absent from

⁹⁰ Military records of Edward Schad Jr., statement of personal history, (11/16/66).

⁹¹ See Mabel Hughes declaration ¶ 29.

⁹² School Records of Edward Schad Jr., Fullerton Union High School District (9/65 – Fullerton, California).

⁹³ Military Records of Edward Schad Jr., statement of personal history, (11/16/66).

school 37 times.⁹⁴ His school grades also took a dive, he failed biology and math and had to repeat math during summer school. During Ed Jr.'s junior year in high school, he failed English II, Intro to Algebra, and Mechanical Drawing.⁹⁵ On October 9, 1959, just after he started his senior year at North Syracuse Central High, the Schad family moved again and Ed Jr. was enrolled in yet another high school; Chittenango Central High. According to the Mabel Hughes, Edward Sr.'s moved the family out to his mother's farm in Bridgeport, New York:⁹⁶

...Edward's mother died and Edward decided that we should move into her old farmhouse in Bridgeport, which is also just outside of Syracuse. I did not want to move there because the house was really old and in terrible shape but Edward put in some floors and a bathroom. (Hughes Decl., ¶ 16.)

111. The fact that Ed Jr. was enrolled in three different high schools during a four year span speaks volumes to the disruptive and chaotic environment in which he grew up. The constant moves could easily be tied in with Edward Sr.'s alcoholism, psychosis, and their financial straits. Ed Jr. graduated from Chittenango Central High in 1960. According to high school records, Edward Sr. was self-employed as a painter in 1959.⁹⁷

112. On May 18, 1959 Ed Jr. was arrested for grand auto larceny; he was 17 years old.⁹⁸ He was arrested again two months later and again charged with grand auto larceny. He was sentenced to three years probation⁹⁹ but was released from all forms of civil restraint on September 25, 1961.¹⁰⁰ Both of these juvenile offenses could be

⁹⁴ School Records of Edward Schad Jr., North Syracuse Central High School (1956-69).

⁹⁵ School Records of Edward Schad Jr., North Syracuse Central High School (1956-59).

⁹⁶ School Records of Edward Schad Jr. Chittenango Central High School (10/59-6/60).

⁹⁷ School Records of Edward Schad Jr. Chittenango Central High School (10/59-6/60).

⁹⁸ Prison Records of Edward Schad Jr., Utah State Prison, Admission Summary (6/29/70).

⁹⁹ Military Records of Edward Schad Jr., enlistment record, (11/29/61).

¹⁰⁰ Military Records of Edward Schad Jr., inclosure [sic] to DA form 3072-1, (11/18/66)

symptomatic of Ed Jr.'s desperate attempt to escape his abusive household and the impulsive behavior that follows Ed Jr. throughout his life; impulses that are only self-defeating and cannot have any good consequences.

113. After high school, Ed Jr. worked for Williams Food Store for a few months. In April of 1961 he worked for Cooper Decoration Company in the decoration installation department and remained employed there until he enlisted in the Army.¹⁰¹ A letter of recommendation from his boss at Cooper Decoration Company stated that Ed Jr. was advanced to a foreman position during the last three months of his employment and that he was a "conscientious, hard working employee, quick to learn and to assume responsibility."¹⁰²

Sibling Trauma: Edward Jr.'s Brother Thomas's Mental Illness:

114. Often children who are raised in chaotic, abusive, traumatic households attempt to get out as soon as they can. Ed Jr.'s sibling Thomas Schad escaped the family violence by enlisting with the army at the age of 18. For reasons that are unknown Thomas did not graduate from high school and only completed 3 years.¹⁰³ Thomas served in the Army from May 1, 1967 until May 8, 1970; he fought in Vietnam from November 16, 1967 until June, 26, 1968 when he was wounded. While in the army Thomas obtained his high school equivalency degree, his GED in 1969.¹⁰⁴ In May of 1970, Thomas was transferred to USAAC in St. Louis, Missouri to begin his career as a

¹⁰¹ Military Records of Edward Schad Jr., employment record section 6 of enlistment record, (11/21/61).

¹⁰² Military Records of Edward Schad Jr. letter of recommendation to the military by Henry N. Cooper, Vice President of Cooper Decoration Company, (11/20/61).

¹⁰³ Military Records of Thomas Schad, enlistment record (5/1/67).

¹⁰⁴ Military Records of Thomas Schad, form DD 214 (date unclear).

US Reservist as his three year term is expired.¹⁰⁵ In June of 1971, Thomas was officially discharged from the reserves because the army was unable to locate him.¹⁰⁶ What happened to Thomas or where he went during this time is not known.

115. Trauma can breed extensive and permanent psychophysiological changes. Thomas appeared to exhibit a cluster of generalized anxiety symptoms and specific fears. Corroborating Ed Jr.'s compromising environment, Thomas Schad's military records reveal a long-standing history of alcoholism and mental illness similar to his fathers which also supports a genetic loading in the Schad family for mental illness. Thomas described sleep problems, nightmares, intrusive thoughts, hyper arousal, and displayed signs of psychic numbing.¹⁰⁷ Hyper arousal means that the person startles easily, reacts irritably to small provocations, sleeps poorly and is indicative of someone who has been traumatized. He was admitted numerous times to local VA hospitals for alcohol and mental health related problems.¹⁰⁸

116. Thomas Schad was severely impaired. Thomas continued to be seen by counselors but he was non-responsive to treatment. Thomas Schad was hospitalized from November 7, 1990 until November 16, 1990 at the Syracuse VA Medical Center. Upon admittance he was diagnosed with Upper GI bleeding and delirium tremens; he was a 41 year-old white male with a long history of alcoholism. He stated that he had been drinking two cases of beer a day since the age of 20. Past medical history reports significant alcohol history; injury to right ankle; and exposure to malaria during his tour

¹⁰⁵ Military Records of Thomas Schad, form DD214 (date unclear).

¹⁰⁶ Military Records of Thomas Schad, letter orders, (6/3/71).

¹⁰⁷ VA Records of Thomas Schad, (12/20/90—Buffalo VAMC).

¹⁰⁸ VA Records of Thomas Schad (11/7/90 – 7/29/99).

in Vietnam.¹⁰⁹ After an evaluation Thomas was deemed a suitable candidate for rehab at Canandaigua VA Hospital. He was admitted to the alcohol dependency treatment program on November 16th:

alcoholism resulting in multiple problems, including black-outs, vomiting blood, shakes, loss of weight, marital problems....

He had his first drink at age 14. The patient started drinking alcoholically at 21...

117. A mental status exam revealed that Thomas was unkempt, had no teeth, exhibited poor insight, and judgment.¹¹⁰ Thomas had been charged six times for driving under the influence.¹¹¹ Records indicate that Thomas appeared to be suffering from some PTSD issues. Specific observations noted that Thomas first entered treatment because all his friends were dying from alcoholism. He was able to work with the PTSD staff, where he revealed some unresolved issues to be followed up at the Buffalo Combat Stress Unit at the Buffalo VAMC.¹¹²

118. Thomas was admitted to the Buffalo VAMC on December 17th, 1990 and remained there for three days. He was diagnosed with 1) PTSD, chronic; 2) Dysthymic D/O; 3). Alcoholism in remission at the Buffalo Combat Stress Unit. Thomas was discharged without any medication and to be followed as an outpatient. Just a few months after he was discharged, Thomas was admitted again as an inpatient to the Buffalo VAMC with sleep disturbances, nightmares, intrusive thoughts, psychic

¹⁰⁹ VA Records of Thomas Schad, Martin Noonan, M.D, (11/15/90—Syracuse VAMC).

¹¹⁰ VA Records of Thomas Schad, Carolyn Fallahi, Ph.D., and D. Alankar, M.D. (12/8/90—Canandaigua VAMC).

¹¹¹ VA Records of Thomas Schad, Carolyn Fallahi, Ph.D., and D. Alankar, M.D. (12/8/90—Canandaigua VAMC).

¹¹² VA Records of Thomas Schad, Carolyn Fallahi, Ph.D., and D. Alankar, M.D. (12/8/90—Canandaigua VAMC).

numbing, and survival guilt.¹¹³ Veterans who are preoccupied with survival guilt often experience an intense fear that they will be abandoned once they develop a meaningful relationship.¹¹⁴ This paranoia leaves a person feeling alone and afraid. Thomas remained at the Buffalo VAMC from February 27, 1991 until he was discharged on April 16, 1991. During this time his PTSD symptoms were treated with "individual and group psychotherapy, grief experience group, stress management group, and vocational group." It is noted that his feelings of guilt and grief will require more work and his affect was only slightly less restricted at the time of his release.¹¹⁵

119. Thomas continued to be seen by counselors at the VA throughout the entire year and the rest of his life. He was hospitalized on March 4th until April 20, 1991 at the Syracuse VAMC and again on September 12, through October 10, 1991. Thomas displayed symptoms of depression and suicidal ideation upon his admittance; he was admitted intoxicated. He stated that his family and friends have abandoned him; he was confused and desperate. An ex-counselor at the Buffalo VA recommended his hospitalization. During his stay, he was maintained on Doxepin 150 mg PO (by mouth) HS (at bedtime) and Ibuprofen p.r.n (as needed). Thomas was discharged four days earlier because he abused alcohol while on the ward.¹¹⁶

120. Late in 1997, Thomas Schad once again was admitted to the Syracuse VA medical center:

This is an unfortunate 50-year-old white male who presented to the emergency room on 12/15/97 with complaints of fever, chest pain, shortness of breath,

¹¹³ VA Records of Thomas Schad, J. Ferraro, Ph.D. and M. Sorroche, M.D. (12/20/90—Buffalo VAMC).

¹¹⁴ Gover, H. (1984). Survival guilt and the Vietnam veteran. *Journal of Nervous and Mental Disease*, 172, 393-397.

¹¹⁵ VA Records of Thomas Schad, discharge summary, J. Ferraro, Ph.D. and M. Sorroche, M.D. (4/16/91—Buffalo VAMC.).

¹¹⁶ VA Records of Thomas Schad, discharge summary, Timothy Hayes, M.D. (10/10/91—Syracuse VAMC).

lethargy, change in mental status. He did have a past medical history significant for depression, post-traumatic stress disorder...also heavy alcohol abuse, chronic low back pain, and peptic ulcer disease... Thomas' health deteriorated in the hospital until radiation oncology was called and it was determined that "the cancer was deemed to be incurable."¹¹⁷

During his two-month stay in the hospital, Thomas exhibited signs of psychosis and feared that one of the male nurses followed him home at night. In addition to being in a psychotic state, he stated he was addicted to Valium and morphine.

121. After a long battle with mental illness, alcoholism, and health problems, Thomas Schad died on March 28, 1998, at his home in Salina, New York. The cause of death was metastatic lung cancer due to post-obstructive pneumonia and severe chronic obstructive pulmonary disease. His mother, Mabel Schad was the informant on his death certificate.¹¹⁸

IV. YOUNG ADULTHOOD/ INSTITUTIONALIZATION

Edward Jr.'s Military Service: Two Failed Attempts to make it on his Own:

Army (Round #1) [Edward Schad Jr. is 19 years old]

122. Despite the fact that Ed Jr. had a good job where he was well-liked and advancing within the company, Ed Jr. was still unwelcome at home and he needed an escape from the extremely volatile Schad household.

123. On 11/29/61, Ed Jr. enlisted in the United States Army for the first time;¹¹⁹ he signed up for a period of three years.¹²⁰ Military records indicate that he adjusted well and showed promise of advancement. He completed basic training, as well as "advanced,

¹¹⁷ Medical Records of Thomas Schad (12/15/97-2/10/98 – Syracuse VAMC)

¹¹⁸ Certificate of Death of Thomas Schad (3/28/98 – Salina, New York).

¹¹⁹ Mr. Schad's Service No. was RA12625903. See 1979 PSR, p. 15. Mr. Schad re-enlisted in the Army in 1966, as is discussed in a separate section, below.

individual training” at Fort Leonard Wood, Missouri. Ed Jr. did quite well in his advanced individual training and in May of 1962, a letter of commendation was sent to him congratulating him on scoring 99% on his end of Cycle Proficiency Test. The letter states that his, “near perfect score will be an inspiration for all future Engineer trainees to try and equal. To surpass your score would require a perfect score which is indeed a rarity, even among more experienced troops.¹²¹” At the time of his transfer to Fort Benning, Georgia in 1962, “he held the rank of Private First Class (E-3).”¹²² Ed Jr.’s main civilian occupation was Decorating Specialist.¹²³

Institutionalization (adjustment and damaging experiences):

124. It was while stationed in Fort Benning that Ed Jr. first got into trouble with the law as an adult cutting short what might have been a promising future in the service and an escape from his past. On June 18, 1962, shortly after his arrival at Fort Benning, Ed Jr. was deemed Absent Without Leave [AWOL].¹²⁴ Shortly thereafter, he was arrested and charged with Auto Theft, a misdemeanor under Georgia law.¹²⁵ In subsequent (unrelated) court proceedings, Ed Jr. testified about the circumstances of the 1962 Fort Benning incident:

About the second week we got to Fort Benning, and we got in our regular outfit, we went out on the town one night, a buddy and I, and we started drinking, met

¹²⁰ Military Records of Edward Schad Jr., statement of understanding of enlistment promises (11/29/61).

¹²¹ Military Records of Edward Schad Jr.’s, headquarters 1st Battalion, Wallie S. Perez, Captain of Commanding, (5/16/62).

¹²² See 1979 PSR, pp. 14-15.

¹²³ Military Records of Edward Schad Jr., Enlistment record (11/29/61).

¹²⁴ Military Records of Edward Schad Jr., service record (11/29/61-9/10/62).

¹²⁵ Mr. Schad’s 1985 PSR lists the “Date” of his Georgia “Auto Theft” as 6-30-62. It is unclear whether that was the date of his arrest or the date of sentencing.

these other two boys from the outfit below us at Fort Riley. We didn't get four or five blocks, they picked us up. They told us the care was stolen. ...¹²⁶

125. Ed Jr.'s explanation of the joyriding incident, coupled with his sudden, unexplained AWOL suggest impulsivity, restlessness, poor judgment and, perhaps most notable, extremely self-defeating behavior – a pattern of symptoms and behaviors which was pervasive throughout the decades which followed. Despite this quite obvious pattern, and the fact that he repeatedly suffered serious (often predictable consequences of his actions – legal, financial and interpersonal – he was apparently unable to control or protect himself from his own impulsive, self-destructive, and wholly unrewarding impulses. His behavior during this period also reveals a young man easily led, easily influenced, with little (if any) direction, or even knowledge of his own status or abilities.

126. Ed Jr. was convicted of the misdemeanor and sentenced to six months on a chain-gang and six months' suspension.¹²⁷ He served his sentence at the Muscogee County Public Work Camp in rural Leedsburg, Georgia.

Muscogee County Public Work Camp – Leedsburg, Georgia

127. Ed Jr. remained captive on a Georgia chain gang until sometime in December of 1962. In addition to criminal sentence, he was also expelled from the Army. On September 10, 1962, while still serving hard labor, Ed Jr. was formally discharged from the Army "under other than honorable conditions," the consequence of his civilian conviction. When Ed Jr. emerged from his sentence on the Georgia chain

¹²⁶ Arraignment transcript, *State of Wyoming vs. Edward Schad, Jr.*, Co. of big Horn, 5th Jud. Dist. Ct., Crim. #1597 (8/22/63).

¹²⁷ No record of the specific Georgia charges are in the record – Ed later reported being sentenced "for accessory after the fact of being with a stolen automobile." (Big Horn arraignment testimony (8/22/63).)

gang, he had only a vague understanding of his status vis-à-vis the service and found himself facing a very uncertain future:

128. While stationed at Fort Benning Ed Jr. was charged with joyriding in civilian court. After serving his jail sentence he was told by civilian authorities to go home, so he did.¹²⁸ He does not know of any discharge at this time.¹²⁹

129. Descriptions of Ed Jr., then 20 years old, are of a young man who appears either oblivious to his surroundings, apathetic to his own well-being, or perhaps both.

130. I am told by counsel that there are almost no records available which describe Ed Jr.'s labor on the chain gang, the conditions he endured, his personal experiences, or the state of his health during his six months of convict labor. There is some evidence, however, indicating that Ed Jr. and his fellow inmates were subjected to brutal conditions and suffered some form of extreme distress or misfortune -- very possibly a collective trauma -- which may have resulted in severe, long-term damage.

131. Eight months after Ed Jr.'s release from the chain gang and eviction from the service, he was charged and tried in a Wyoming court after passing a bad check to his landlady for \$52.00. Ed Jr. was arraigned in Big Horn County, where he was questioned by both his counsel and the presiding judge about the physical treatment he endured on the Georgia chain gang and its subsequent effect on his behavior and mental state:

...

A [Schad]: ... I spent six months in the chain gang in Georgia.
 Q [DA]: Six months on the chain gang and six months suspension?
 A [Schad]: Yes, sir.

BY THE COURT:
 Q: What institution?
 A: That was Leedsburg, Georgia.

¹²⁸ "I met one of the boys from the chain gang there and got in this car and kept on going home. I went home. The first place I went was home...." (8/22/63 Big Horn arraignment hearing testimony.)
¹²⁹ 1979 PSR, p. 15.

Q: State penitentiary or what?
A: It wasn't a state penitentiary. It was a chain gang place. They have quite a few around the state. They have one in Montezuma.

...

BY MR. DAVIS [defense counsel]:

Q: You were 20 at that time?
A: I spent my 20th birthday there, yes, sir.
Q: Were you mistreated during your assignment to the chain gang?
A: Well, according to my opinion, when I was in the chain gang, I wasn't the only one, but we were—
Q: Do you think that has had an effect on your subsequent demeanor and behaviour [sic]?
A: Yes, sir. I know it has. It just turned me completely inside out.
Q: After the Georgia Episode where did you go?
A: [Writing obliterated...]

BY THE COURT:

Q: What?
A: I say hot under the collar, blowing off a lot of steam, getting out or over my bruises. I met one of the boys from the chain gang there and got in this car and kept on going home. I went home. The first place I went was home to Bridgeport, New York. Then my father turned me off because of the incident. He didn't want me around. My mother was on his side, which I feel myself. They had two children home. I could see where it hurt the family. The next town is Syracuse. I got a bus and went to California to my uncle's place. Spent three weeks there. My uncle told [sic] me down. He wouldn't help me. ... They shipped me back to New York and found I was wanted on the other car [sic] from Georgia to Syracuse. ...¹³⁰

132. This testimony is frustrating in its failure to specify the nature of his maltreatment, but it certainly suggests a traumatic experience or series of events, apparently suffered by others, which "just turned me completely inside out." What was "the Georgia Incident"? We still do not know. It is unfortunate that both counsel and the court found this information sufficiently compelling to probe deeper, trying to explore the effects of this "incident" on Ed Jr.'s subsequent demeanor and mental state. The state of the record suggests that Ed Jr. was reluctant to disclose that information. Ed Jr. did offer

¹³⁰ 8/22/63 Big Horn testimony.

that, upon returning home after his release, knowledge of “the incident” caused his father to literally disown him. It is hard to imagine such a harsh response to a clerical error of any kind, so it seems fair to assume that Ed Jr.’s experience in Georgia carried a considerable stigma of some kind. Whatever the nature of the “Georgia Episode,” it was perceived by Ed Jr. as serious, threatening, and humiliating.

133. When I asked Ed Jr. about his experiences in Georgia, he replied: “no problem in Georgia. In fact, I don’t even remember it.” I attempted to ask more specifically whether or not Ed Jr. had been victimized in Georgia, he replied, “it’s not that I can’t handle myself. Games here; handball – didn’t hit the ball against the wall...hit against me.” Thus, this appears to be a case where, in an attempt to defend against psychological distress, Ed Jr. closely guards against what his prior testimony suggests are traumatic experiences.

Panic-driven manic episodes:

Columbus, GA – Transporting stolen vehicle

134. Immediately upon his release from the chain gang, Ed Jr. repeats the same pattern of impulsivity, agitation, restlessness, anxiety, manic behavior, disorganized thought processes, and inevitably self-defeating acts and decisions. In his words:

I say hot under the collar, blowing off a lot of steam, getting out or over my bruises. I met one of the boys from the chain gang there and got in this car and kept on going home. I went home. The first place I went was home to Bridgeport, New York.¹³¹

135. Ed Jr.’s report is clinically quite salient in at least two respects. First is his language – he states that he “got in this car and kept on going home.” He doesn’t see himself as having “taken” or “stolen a car” – indeed, nothing in his language suggests

that the car was his primary objective. Agitated and traumatized, he was apparently overwhelmed by a compelling impulse to escape the "Georgia Episode" and keep on going. Second is his manic, irrational, and seemingly uncontrollable impulse to return "home," to "family – another recurring theme throughout Ed Jr.'s life. Even the language he uses is pressured, obsessive, agitated:

I...got in this car and kept on going home. I went home. The first place I went was home to Bridgeport, New York. Then my father turned me off because of the incident. He didn't want me around. My mother was on his side...The next town is Syracuse. I got a bus and went to California to my uncle's place. Spent three weeks there. My uncle told [sic] me down....¹³²

136. In April of 1963, Ed Jr. was indicted by a federal grand jury in Utica, New York and charged with Transporting a Stolen Vehicle from Columbus, Georgia to Syracuse, New York, a violation of 18 USCA §2312.¹³³ At his arraignment the following month, unrepresented by counsel, he pled guilty. On June 10, 1963, he received a suspended sentence and three years probation.¹³⁴ Ed Jr. later testified that he was released June 20, 1963 after three months in a federal prison:

They shipped me back to New York and found out I was wanted on this other car [sic] ffrom Georgia to Syracuse. I stayed there three months until June 20th of this year until I was released on federal probation, turned me on the street and room at the Y.M.C.A. No other help. ...¹³⁵

California/Las Vegas, NV – Car theft (12/62-1/63)

137. Having driven directly from Columbus, Georgia to his "home" in Syracuse, Ed Jr. found that, once again, he was unwelcome with both his father and mother, who turned him away. Still seeking "family," he turned around and headed for

¹³¹ 8/22/63 Big Horn testimony.

¹³² 8/22/63 Big Horn testimony.

¹³³ Indictment, *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271 (N.D.N.Y. 4/63).

¹³⁴ Judgment, *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271 (6/10/63).

an alternative "home" with his uncle in California. At that time, he had not yet been charged in connection with transporting the stolen car from Georgia to New York:

The first place I went was home to Bridgeport, New York. Then my father turned me off because of the incident. He didn't want me around. My mother was on his side... The next town is Syracuse. I got a bus and went to California to my uncle's place. Spent three weeks there. My uncle told [sic] me down. He wouldn't help me.¹³⁶

When his uncle, too, rejected him, Ed Jr. headed for Las Vegas, Nevada, where he faced several new criminal charges, including a federal indictment alleging that during his brief stay in California, he had stolen a 1959 Renault.¹³⁷

They picked me up in Vegas as I went through a court deal there. A federal court over stolen car. I was found not guilty. I was in California at the time. I happened to look like the person that did it. ...¹³⁸

In fact, Ed Jr. was found not guilty.

Las Vegas, NV¹³⁹ -- Impersonating an Officer¹⁴⁰ (1/63)

138. On January 25th, 1963, Ed Jr. is charged with impersonating an officer a misdemeanor, and sentenced to ten days in jail.

Las Vegas, NV -- "Military Fugitive from CA" (1/63)

1/25/63	"Misd., 10 days jail"		
1-25-63	Las Vegas, NV ¹⁴¹	Impersonating an officer	#M 44248 ¹⁴²
1-25-63	Las Vegas, NV	"Military fugitive from CA"	#M 44248 ¹⁴³

¹³⁵ 8/22/63 Big Horn testimony, p. 10.

¹³⁶ 8/22/63 Big Horn testimony, p. 10.

¹³⁷ USDC #CR 765 (Las Vegas).

¹³⁸ 8/22/63 Big Horn arraignment testimony, p. 10.

¹³⁹ 1985 PSR lists both charges together under the same date (1-25-63); gives only one disposition -- unclear whether it applies to one or both.

¹⁴⁰ 1985 PSR lists this charge separately from the Utica charges, but it's unclear whether or not they stem from the same incidents at the subsequent Utica charge (#33271). The 1979 PSR discusses them as separate actions. (See 1979 PSR, pp. 8-9.)

¹⁴¹ The available paperwork doesn't indicate where the violation was alleged to have occurred. This may stem from the same incident(s) underlying #33271, filed in Utica three months later.

¹⁴² 6/29/70 USP Admission Summary.

¹⁴³ *Ibid.*

1. Utica, NY -- Illegal wearing U.S. Army uniform: (12/27/62-1/6/63)

From on or about [12/27/62] to on or about [1/6/63], at or near Syracuse and at or near Bridgeport...[ES] possessed and wore the duly prescribed uniform of a member of the United States Army, to wit, as a Second Lieutenant thereof...¹⁴⁴

4/23/63 – indicted by grand jury...18 USCA §702
5/14/63 – arraigned; pled guilty; unrepresented by counsel
6/10/63 – suspended sentence...2 yrs probation¹⁴⁵

12-27-62 1-16-63 Syracuse/Bridgeport Utica Illegal wearing Army uniform (18 USC §702) #33271¹⁴⁶ (N.D.N.Y.)

2. Utica, NY -- Probation violation (8/63)

8/16/63 – arrest warrant issued -- failure to report; leaving district w/o P.O.'s permission:¹⁴⁷

ED:

They came to my door day in and day out, come to where I was working. I got in trouble with the boss over that. I was working on a machine, tie down four or five men. I got up and took off. I took this car from New York and brought it here. I needed money and I wrote a check in Basin. I couldn't take the pushing any longer before I do something. I am not used to being that way. I have had so much treatment I can't take any more.

BY MR. DAVIS:

Q: In other words, the spiritual guidance these people were trying to give you made you revolt?

A: Not so much spiritual. What I should do and can't do. If I want to go to church on Sunday, it's my business. I don't tell anybody to go to church. They tell me every night I couldn't do that. I had to have glasses. The first thing I bought was glasses. One started getting up over that. I have to have glasses. They put [sic] it too far. I took off....

Q: Were you planning on staying in Wyoming, or were you going on?

¹⁴⁴ Indictment, *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271 (N.D.N.Y. 4/63).

¹⁴⁵ Judgment, *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271 (6/10/63).

¹⁴⁶ Indictment, *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271 (N.D.N.Y. 4/63).

¹⁴⁷ Petition (8/14/63) and Order (8/16/63), *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271.

A: No. I was just moving on. I didn't know where I was headed. I figured back up towards Yellowstone Park, a place to be by myself. I had no particular place to go.

...

9/18/65 – warrant withdrawn:

Information received from the Wyoming State Penitentiary attitude and work in the Mechanics School was above average. He has had no record of any rule infractions and he is reported to be a good and conscientious worker. ...¹⁴⁸

8-16-63
#33271¹⁴⁹

Syracuse, NY

Utica, NY (USDC)

Probation violation

Mental state prior to violating probation: Another unplanned drive across the country:

139. Ed Jr. behaviors are often erratic and impulsive; they are extreme both as an action and in its consequences. The only foreseeable results to his actions are imprisonment, isolation, and total dependence on others that were absolutely practicable and virtually inevitable. Ed Jr. had no money, had no thought out plan or real destination, and he could not have possibly had any true hope of achieving anything from this but more trouble, chaos, and misery. Legally, this is a completely self-defeating act as there was no possible benefit to be gained from this erratic driving spree. It is possible that Ed Jr. was fleeing from what he perceived as demons and pressures, it could also be a response to rejection and abandonment that is parallel to the trauma he experienced as a child and continues to haunt him. In these periods, Ed Jr.'s behavior appeared "manic." Other times, he was down and depressed, feeling overwhelmed and distressed.

140. Ed Jr.'s testimony in Big Horn, Wyoming suggests that he was suffering from feelings of terror, confusion, paranoia, intrusions, mania alternating with periods of

¹⁴⁸ Petition (9/3/65) and Order (9/18/65), *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271.

depression and hopelessness. This driving spree is symptomatic of someone who is exemplifying manic, irrational, and seeming uncontrollable behavior that again has no possible benefit. This bizarre behavior is part of a life-long pattern for Ed Jr. and is an extreme example of his childhood solution to severe distress.

Big Horn County/Wyoming State Penitentiary (1963)

1. Basin, WY – Forgery (8/63) [21yo]
2. Basin, WY – Auto theft (1963) [21yo]

8/21/63 – 1970 FBI rap sheet shows charges of forgery and auto theft (#2819)
8/22/63 – discussed at Ed’s WY arraignment hearing:

ED: ...They sent these church goers to me. I am a Protestant. They came to my door day in and day out, come to where I was working. I got in trouble with the boss over that. ... I got up and took off. I took this car from New York and brought it here. ...

DA: And the car that you brought to Wyoming you had stolen in New York, isn't that right?

ED: Yes, sir.

DA: That was the car that you were picked up in?

ED: Yes, sir.

CT: What kind of a car was it that you stole and drove out here?

ED: A 1960 Ford station wagon, Your Honor.

CT: Do you know who it belongs to?

ED: No, sir. I just know by the name.

CT: You didn't know the person?

ED: No, sir.¹⁵⁰

...

8-63 Syracuse, NY Basin, WY Auto theft (1960 station wagon)
#2819¹⁵¹

¹⁴⁹ Petition (8/14/63) and Order (8/16/63), *U.S.A. vs. Edward Harold Schad, Jr.*, USDC #33271. A bench warrant issued for failure to appear as required and for leaving the "district". It was quashed 9/10/63 as Ed was already in custody in Wyoming.

¹⁵⁰ 8/22/63 Big Horn arraignment testimony, pp. 10, 14, 16.

¹⁵¹ Auto theft appears under this case # on Ed's 1970 FBI rap sheet, and Ed talks about it during his Big Horn arraignment testimony, but I've never seen a record of charges being filed.

8-63	Casper, WY	Bad checks (\$30 & \$42) ¹⁵²
8-21-63	Basin, WY	Big Horn Co., WY Forgery (\$52 bad check)
#1597		

Army (Round #2) [Edward Jr. is twenty-four years old]

141. On November 29, 1966, Ed Jr. enlisted in the Army for the second time. Why Ed Jr. choose to go back to the army where he did not do so well the first time around displays the many erratic and illogical patterns of his life; it is also very likely that Ed Jr. did not have anywhere else to turn. Once again his parents did not welcome him and turned him away; Ed Jr. was left without any place that could provide him the emotional support he so desperately needed. When asked about the army, Ed Jr. explained that he enjoyed the Army and stated simply that, "the Army was nice to me."¹⁵³

142. Ed Jr. filled out a personal history statement for the military. His permanent address was RD #1, Kirkville, New York. Three years after graduating high school, he attended Shaw Vocational School of Auto mechanics and civil defense. He graduated in March of 1966 with a degree as an instructor.¹⁵⁴ Ed Jr. attended this vocational school while he was incarcerated in Wyoming.

143. Ed Jr. enlisted in the Army for a period of three years; his initial assignment was ACGP #12 Combat Engineer.¹⁵⁵ In November of 1966, Ed Jr. was selected to attend class at the US Army Artillery OCS School in Fort Dix.¹⁵⁶

¹⁵² No record of charges ever being filed, but the prosecutor brought it out through Ed's testimony at his Big Horn arraignment.

¹⁵³ Interview of Edward Schad Jr. by Dr. Charles Sanislow and Jay Pultz (2/19/00 – SMU-II ASP).

¹⁵⁴ Military Records of Edward Schad Jr., statement of personal history (11/16/66).

¹⁵⁵ Military Records of Edward Schad Jr., enlistment record, (11/29/66).

¹⁵⁶ Military Records of Edward Schad Jr., selection for OCS, Frank R. Monetta, Asst. AG (11/66).

144. Mr. Arvin Hardenburgh filled out a personal reference for Ed Jr. Mr. Hardenburgh stated that he has known Ed Jr. since he was born. He wrote that Ed Jr. has a "fine knowledge of auto mech (sic) and very active in the civil defense program. He checked "average" for the following categories: general intelligence, judgment, home environment, and emotional stability.¹⁵⁷ Ed Jr.'s neighbor, Mrs. Theresa Fox, returned a personal reference form for Ed Jr.; she stated that she has known Edward Jr. since October of 1957. She wrote the following about Ed Jr.'s skills, "Edward has the ability to learn fast and to do any task to the best of his ability. After high school he went on to vocational school to study civil defense and auto mechanics when he came out first in both of his classes. I am very proud of Edward in his ambition to keep learning". She checked the average box for the following categories: general intelligence, initiative, self-confidence, and home environment.¹⁵⁸ Reverend Robert Mudge, who also resided at RD #1 Kirkville, filled out a personal reference for Ed Jr. His relationship to Ed Jr. was "church official". He stated he has known Ed Jr. since May of 1958. Reverend Mudge wrote the: "[Edward Jr.] has been a very faithfull [sic] and understanding individual. His skills which I have listed may not be the ones you may be looking for, but to me the first two I mentioned are his most important and with these two he will go along ways." Under the section "known skills possessed", Reverend Mudge wrote "the skill to grasp any subject, the skill to achieve any goal...the skill to paint, the skill to use common sense."¹⁵⁹

145. A medical history report filled out by Ed Jr. stated that his sister, Sherry Schad was dead at birth. It is possible that Ed Jr. never knew the true cause of his sister's

¹⁵⁷ Military Records of Edward Schad Jr., personal references, Mr. Arvin Hardenburgh, (11/17/66)

¹⁵⁸ Military Records of Edward Schad Jr., personal reference of Mrs. Theresa Fox (11/17/66).

death and that this was what the siblings were told about the death of their sister.¹⁶⁰ Ed Jr. noted that he has worked with radioactive substances and writes "During training for civil defense I used CO 60 and I have received a total of 18 m/r".¹⁶¹ The radioactive substance Ed Jr. referred to is Cobalt-60, the most common radioactive form of Cobalt. While it is unclear what the uses of this substance in Civil Defense training were and how Ed Jr. may have come into contact with the substance, external exposure to gamma radiation of Cobalt-60 is of a major concern. The Environmental Protection Agency states that exposure to low levels of gamma radiation over an extended period of time can produce many adverse health effects. Currently, the EPA has established a minimum contamination level of 4 millirem per year of Cobalt-60.¹⁶² It appears that Edward Jr. was exposed to 18 millirem.¹⁶³

146. On December 7, 1966 Ed Jr. was in basic training. In May of 1967, Ed Jr.'s brother, Thomas voluntarily enlisted in the service for 3 years and went to Vietnam in November.¹⁶⁴ He remained in Vietnam until he was wounded in June of 1968. The nature of Thomas' wounds is unclear except that he suffered "MFW" on the right hand and both legs on June 13, 1968.¹⁶⁵ Ed Jr. requested a Vietnam tour but was rejected because he already had one brother fighting in Vietnam.

147. As it happened, everyone in Ed Jr.'s unit was shipped to Vietnam except him and another soldier who was sent to Japan. After being turned down for a Vietnam

¹⁵⁹ Military Records of Edward Schad Jr., personal reference of Reverend Robert Mudge (11/17/66).

¹⁶⁰ Military Records of Edward Schad Jr., Report of medical history (11/17/66).

¹⁶¹ Military Records of Edward Schad Jr., Report of medical history, (11/17/66).

¹⁶² Environmental Protection Agency, Facts about Cobalt-60 (7/02).

¹⁶³ Military Records of Edward Schad Jr., Report of medical history, (11/17/66).

¹⁶⁴ Military Records of Thomas Schad, enlistment records (5/1/67).

¹⁶⁵ Military Records of Thomas Schad, DA Form 20, (9/7/69).

tour of duty Ed Jr. called home to see if his father can help him. Ed Sr. refused to help and in fact, disowned him during this same phone call.¹⁶⁶

148. Ed Jr. was advanced to Private E-2 on February 17, 1967 and applied for officer candidate school. Just a few weeks later, Ed Jr. withdrew his application stating that he lacked the desire and determination to complete the training and meet the standards set forth by OCS. He was counseled by his commanding officer in an attempt to get Ed Jr. to accept the responsibilities of an officer but he was unsuccessful. Ed Jr. felt that he could not meet the high standards of the OCS Prep or the OCS.¹⁶⁷ Ed Jr. feelings of inadequacy appear to be unfounded. This may stem from a fear of failure or fear of not being good or even both. This example is especially bizarre for someone like Ed Jr. who typically displays feelings of grandiosity even to the point of being delusional. His lack of desire to achieve something that will ultimately benefit him and his career with the military is symptomatic of someone who is experiencing feelings of depression. Ed Jr.'s longstanding pattern of masking depression with his highly energized state and denial of severe problems and stress parallels his parent's solution to stress—depression masked with substance abuse.

149. Ed Jr. was sent overseas on April 27, 1967¹⁶⁸ until June 6, 1968; he was stationed in the military Foreign Service in Germany. While stationed in Germany Ed Jr. met the Hein family. According to Stephan Hein, the family met Ed Jr., at a fairground in Hanau whereupon they invited him to come to their flat. Ed Jr. made frequent trips to the Hein house and soon became part of their family. This was the family that Ed Jr. longed for, a family that accepted him as one of their own. He even called Mr. and Mrs.

¹⁶⁶ Interview of Edward Schad Jr. by Dr. Charles Sanislow and Jay Pultz (2/19/00 – SMU-II, ASP).

¹⁶⁷ Military Records of Edward Schad Jr., Statement of Edward Schad Jr., (2/27/67).

Hein, "mum" and "dad". In a desperate need to be liked and to please others, Ed Jr. often helped around the house with chores. He spent holidays with the family and at Christmas, Ed Jr. received the same kind of presents that the brothers in the family received.¹⁶⁹

150. Ed Jr.'s service in the foreign military ended and he was taken away from the only family he ever had; the Hein family. He was shipped back to the States and just a few days later, on July 1, 1968, Ed Jr. was AWOL from station in Ft. Lewis, Washington. Once again Ed Jr. engages in self-defeating behavior that cannot have any good outcome, he left the army without any real plan or destination and wound up at a café in Salt Lake City where he met Clay Mortensen.¹⁷⁰

Salt Lake City, Utah Arrest

151. According to the Police Department, Salt Lake City, Utah an officer found Clay Mortensen dead on July 5, 1968. Ed Jr. was arrested for the murder of Mortenson in Hanau by the Hanau City Police at the Hein's apartment.

152. In 1968, Edward Schad, Jr. was convicted of second degree murder in the state of Utah for:

the accidental death of Clare Mortenson arising out of a consensual sex act involving autoerotic asphyxiation. State v. Schad, 470 P.2d 246 (Utah 1970). Mr. Mortenson was a known homosexual who had participated in this type of activity on a "rather regular basis." R.T. 8-22-85 at 31. Dr. James T. Weston, the state medical examiner who performed the autopsy on Mr. Mortenson, concluded that the manner of death was "accidental." Id., at 30. The physical evidence supported this conclusion. Id., Exs. 4 and 5.

¹⁶⁸ Military Records of Edward Schad Jr., National Agency Check Request (10/19/67).

¹⁶⁹ Investigation Report from Jorg Julius (3/24/99)

¹⁷⁰ Supreme Court of State of Utah opinion filed 5/21/70.

Notwithstanding Dr. Weston's opinion, Petitioner was tried for first degree murder for Mr. Mortenson's death. *Id.*, Ex. 3. at 2. The jury convicted Petitioner of the lesser offense of second degree felony murder. *State v. Schad, supra*, at 247, 249-250. The underlying felony was sodomy. *Id.*¹⁷¹

153. On May 29, 1970, Ed Jr. was transferred from Salt Lake City County Jail to Utah State Prison where he began serving a 10 to life sentence. Ed Jr. described his family background to his caseworker at Utah State Prison upon his admission. He stated:

...he was never able to get along with his father. They would always argue. He describes his father as a very heavy drinker who would get drunk and lay around the house for two or three weeks at a time... claims he has had very little contact with his family since 1961 when he entered the military service. At the present time they do not communicate with him at all¹⁷².

154. Ed Jr. was officially discharged from the army on September 23, 1970.¹⁷³ While incarcerated in Utah State Prison, Ed Jr. wrote letters to commanders in the army requesting legal help, copies of military codes, and federal statutes. The army stated that they could not help him as he was charged in a civilian court.¹⁷⁴

155. Military history revealed that Ed Jr. joined the Army November 29, 1961 and was discharged September 10, 1962, under other than honorable conditions when he was sentenced to the Wyoming State Prison. He was permitted to re-enlist in the army after serving his sentence. Ed Jr. reported that he worked at a display show house in New York while he attended high school. Ed Jr. was Methodist and a Sunday school teacher. He wears glasses and there is a notation that his teeth need some attention. The summary found that Ed Jr. was serving a prison sentence that stemmed from a homosexual activity:

Problems: 1.) Homosexual tendencies.

¹⁷¹ *State v. Schad, supra*, at 247, 249-250.

¹⁷² Prison Records of Edward Schad Jr., Admission summary, family background (6/29/70 - USP).

¹⁷³ Prison Records of Edward Schad Jr., State of AZ, County of Yavapai, Adult Probation Department (11/27/79).

¹⁷⁴ Military Records of Edward Schad Jr. L.A. Maiki, (7/24/69)

- 2.) Lacks openness.
 - 3.) Family ties and backing.
- Strengths:
- 1.) Ability to verbalize
 - 2.) Education and ability to learn.
- Recommendations:
- 1.) Medium Custody.
 - 2.) Clerical Work.
 - 3.) College Courses.
 - 4.) Psychiatric help.¹⁷⁵

156. While Ed Jr. was incarcerated in Utah there were numerous intentional fires set in his jail and prison cells by different inmates. He was “burned out three times the day after he went to A-Block.” There were repeated threats against his life as Ed Jr. was perceived by other inmates as a snitch. Ed. Jr. had an exemplary prison record. His rigid rule-following and his naivety made him the perfect scapegoat for other inmates. This was a role that Ed Jr. adopted early on and it was a role that continued to follow him throughout his entire life. Ed Jr. perceived he was in great danger and when he requested protective custody he was moved to the Maximum Facility¹⁷⁶ for the first three years of his incarceration. He was approved for Protective Custody on October 27, 1972.¹⁷⁷ Ed Jr. did not request to be moved from Maximum Security until April of 1975 and he was transferred to Medium Security on May 5, 1975.

157. Not only was living on a maximum security unit psychologically damaging for Ed Jr., it also precluded him from earlier parole and/or reclassification consideration. Isolation forces a person to rely on their psychological resources that are all too often inadequate. Prolonged sensory deprivation, with virtually no human contact, and the unrelenting perception of danger drives a person further into themselves which

¹⁷⁵ Prison Records of Edward Schad Jr., Admission Summary, (6/29/70—USP).

¹⁷⁶ Prison Records of Edward Schad Jr., Chronology Notes (9/22/70).

often leads to an increase in anxiety and fears that sometimes result in psychosis.¹⁷⁸ A 9th circuit court decision found that the prison conditions that exist at Arizona State Prison in the SMU—II “can adversely affect a person’s mental health.”¹⁷⁹ This kind of isolation can produce a great deal of defensiveness in an individual making the person less likely to report psychopathology and instead normalize his behavior and circumstances. This degree of denial prohibits real disclosure and often lends to a person painting himself in the best possible light so as to try to keep themselves together. Providing any hint of what is really going on has the potential of realizing the unresolved trauma and unraveling oneself to the point of decompensation.

158. Whether Ed Jr.’s fear that others were trying to harm him in prison was real or whether his fear of others was a symptom of his increasing paranoia, it still had the effect of debilitating him to the point where he remained incarcerated despite the fact that he was aware that changing units would lessen his sentence.

159. On August 8, 1975, Ed Jr. requested protection from one of the lieutenants:

...He stated had been harassed and called a snitch ever since he came back from Maximum...He was encouraged to consider moving back to D Block as the Board had promised him a date if he could[sic] get to Minimum Security and be there at the time he appeared before the board. He was extremely paranoid and nervous, and talked about a transfer to another prison. He feels he just cannot survive in the population...¹⁸⁰

But just a few weeks later, August 14, 1975, Ed Jr. stated the following:

¹⁷⁷ Prison Records of Edward Schad Jr., Chronology Notes (10/27/72--USP).

¹⁷⁸ S. Grassian (1983). Psychological Effects of Solitary Confinement, *American Journal of Psychiatry*.

¹⁷⁹ See *Comer v. Stewart*, 215 F.3d 910, 916 (9th Cir. 2000)

¹⁸⁰ Prison Records of Edward Schad Jr., chronological notes, Adele Peck (8/7/75 - USP).

...He feels that the problem which made him feel he needed protection was in his own mind and a result of build up over several years...He seemed to be calm and in touch with reality...¹⁸¹

Ed Jr. was eventually transferred to Minimum Security on October 20, 1975.¹⁸²

Edward Jr.'s Mental Health Symptoms:

160. During our interviews, Ed Jr. frequently made statements that bordered on euphoria or hypomania. For example, Ed Jr. stated, "My mom writes me every week. That just blows my mind. It's just so terrific!" In fact, I have been assured by counsel that Ed Jr.'s mother seldom wrote to her son and when she did it was generally a brief note stating her displeasure for his lawyers and the ongoing legal process. These statements, especially given the underlying circumstances, appear delusional and grandiose. In another seemingly inappropriate statement, Ed Jr. reflected that, "Germany was a good time. But I didn't have a life there. As a matter of fact, I've had more of a life since coming to ASP [Arizona State Prison] than any other time." This statement is especially bizarre; Ed Jr. feels that he has more of a life locked up in a maximum security unit on death row than he had as a free man in Germany. In the context of Ed Jr.'s manic defenses and denial, it is less surprising.

161. At times, Ed Jr. appeared irritated and agitated over seemingly diminutive events. This was extremely evident when he feared that our action's or requests (counsels and my own) would be seen as disrespectful or even inconvenient to the custodial staff. Throughout the interview, Ed Jr. was very concerned with not upsetting or inconveniencing the staff.

¹⁸¹ Prison Records of Edward Schad Jr., chronological notes, Peck (8/14/75 - USP).

¹⁸² Prison Records of Edward Schad Jr., chronological notes, (10/20/75 - USP).

162. Ed Jr. exhibited a vulnerability rooted in underlying grandiosity. He was anxious, paranoid, and suspicious and expressed a genuine fear that our having arranged a contact visit would upset an impressive balance that he himself had established.

163. Ed Jr. insisted and appeared to truly believe that he and the prison guards have a meaningful, mutual relationship; one outside of their roles as inmate and guard. He also insisted that he is the one person who really put the facility, which he referred to as "his prison" in order. This display of inflated self-esteem, grandiosity, and an inflated sense of one's own significance is especially bizarre given his circumstance. Another example of his inflated sense of self is his assertion that he is the only one who has taken all the courses that one might conceivably take while incarcerated in Arizona State Prison. Again, Ed Jr. continues his overly optimistic approach combined with denial and grandiose self efficacy as a solution to a terribly stressful circumstance.

164. Ed Jr. often stated that he has "gotta keep moving"; "I never dream, isn't that wild?" He drove from Chicago to Albany with literally no sleep. "I can go a long time without sleeping. I once drove for 4 days with just one ½ hour catnap." These statements reveal a real or perceived decreased need for sleep that is consistent with mania. During his 1978 several-week driving spree he exhibited an appetite dysregulation by his failure to eat an unusual inattention to his own appearance and hygiene.

165. During our interviews, Ed Jr. spoke in an inappropriately loud, pressured, and rapid speech that is associated with mania. His statements were often a flood of traumatic-associations where he could not contain or control his internal process and where one memory led automatically to the next. This "flooding" of memories is often

associated with posttraumatic stress disorder. He was also unable to produce a fluid, consolidated autobiographical memory and was often very difficult to redirect – throughout our interviews his affect was frequently inappropriate and he often, inexplicably, displayed glee and a sense of pleasure with his own sense of humor. Throughout our interviews Ed Jr. was unable to limit his responses appropriately and he continued to provide excessive and irrelevant details (almost uncontrollably). While performing fairly simple copying tasks at my request Ed Jr. talked to himself almost continually, and quite often encouraged himself with statements like, “come on Edward, get yourself together.”

166. Throughout our interviews, Ed Jr. displayed racing thoughts. At one point, during our interview Ed Jr. offered out of the blue that his sister “blames me for my father’s death.” When I asked why she would do that, he circuitously, yet very quickly, said it was because he had left the family unprotected when he joined the service. This display of racing thoughts is remarkable and his rationalization borders on delusional.

167. At one point during the interview Ed Jr. was given a piece of paper divided into four squares and was asked to fill each with a different aspect of his life. Ed Jr., displayed great difficulty when trying to do this and ultimately he could not remain focused on any one of them long enough to make any progress. As more time went by, Ed Jr. became increasingly frustrated and soon began to confuse them. His inability to concentrate, to think, and his distractibility is debilitating in that it keeps him from completing a task. When I asked him specifically about this he stated that he had “Always been like that – just can’t sit still!”

168. Ed Jr. often appeared restless and exhibited psychomotor agitation for extended periods of time. This is indicative in his impulsive, disorganized travel, sudden change of plans, and routines. For example, Ed Jr. went AWOL from the Army in Ft. Lewis in 1968, he went on a 5-week driving spree in 1978; and his statement, "I was living with Wilma in Florida, and one day I came home after work, and I just took off. Left everything and drove for days...I don't even know how many." This is also evident in his statement, "I used to always find myself in places I shouldn't have been...couldn't quite figure out how I'd got there."

169. During his 1978 driving spree, Ed Jr. picked up a couple of French hitchhikers. While they were in the car with him he insisted that they sit in the front seat of the car with him and keep him company as if they were close friends. Ed Jr. did not have insight into how socially inappropriate his behavior was.

170. Ed Jr.'s inappropriate and high risk behavior demonstrates extremely poor judgment which frequently results in adverse consequences including legal and financial difficulties. Examples of this behavior are his auto theft charges in 1959, 1960, and 1968; his AWOL charges in 1967 and 1968; his attempt to fly to Germany without a passport.¹⁸³ These incidents are indicative of reckless and impulsive behavior that cannot and do not benefit Ed Jr. in any possible way.

171. Other symptoms include Ed Jr.'s overwhelming fear, impeccably poor judgment, and self-defeating behavior that may be attributed to his early maltreatment followed by numerous re-victimizations that probably occurred at Leedsburg, Fort Lewis, Big Horn County, and Salt Lake City.

¹⁸³ Interviews of Edward Schad Jr. by Dr. Charles Sanislow and Jay Pultz (2/18/00 & 2/19/00 – SMU-II, ASP).

Utah State Prison Mental Health Records (1970 -1977):

172. Ed Jr. displayed a need for "psychiatric help" and it was recommended as part of his first psychological evaluation upon entering USP. Ed Jr. exhibited significant, long-standing symptoms from additional sources in a broad range of contexts which have repeatedly reported additional symptoms and patterns which, considered in context, suggest a chronic underlying mental disorder that has affected every domain of Ed Jr.'s life from adolescence through the present.

173. While incarcerated in Utah State Prison a number of mental health assessments, diagnoses, and proposed interventions were given to Ed Jr. The available mental health records consist of two reports by Dr. Allan Roe, two by Dr. Jean Ann Walters, and a fifth which is unsigned. All of them are entitled, "Psychological Evaluations." The evaluations by Dr. Roe, prison psychologist, are dated June 11, 1970 and January 7, 1975.

174. A psychological evaluation by Dr. Jean Ann Walters, a prison psychologist was done at the request of Ed Jr.'s caseworker. Assessment procedures include the following: Bender-Gestalt, Bipolar Psychological Inventory¹⁸⁴, Draw-A-Person, Minnesota Multi-phasic Personality Inventory (MMPI), Sentence Completion Test, Shipley I.Q. Scale, Thematic Apperception Test and a Diagnostic Interview. A personality assessment provided the following:

"....Where Mr. Schad does have some problems is in the difficulty which he experiences in handling stress and disappointment. He is easily discouraged getting moderately depressed when things don't work out they way he wants them to. These affective manifestations do not

¹⁸⁴ According to Walters, this was a measure designed by Robert Howell and L. Reid Payne at BYU, with Allan Roe at USP. She stated it was no longer in used because Roe has since developed another test.

precipitate irrational behavior but they are illustrative of basic difficulty in handling the exigencies of life without sufficient support of others.

In many ways Mr. Shad's propensity for discouragement creates a situation in which he becomes dependent upon other people for their emotional support and guidance. As previously stated this is sometimes effective as a mature component of problem solving behavior. However it can become exaggerated when one had difficulty coping with stress. The problems which arise from this situation would be excessive dependency. Mr. Schad is swayable. Peer pressure, and in addition to peer pressure, pressure placed upon him by those in authority whose opinion he respects are factors which weigh greatly with him and which are quite significant in determining his behavior. The presence of a strong authority figure or group in Mr. Schad's life through which he may order his life and definite standards set for him is a significant factor in his life...¹⁸⁵

These statements may explain why Ed Jr. has an exemplary prison record. His desperate need of structure and consistent rules that he can understand and follow was something he never had while growing up. It also suggests why Ed Jr. views this environment favorably.

175. On June 29, 1970, the results of the CATB, a vocational test, found that Ed Jr. "could work well in such occupations as accountant, teacher, bookkeeper, automotive mechanic, electrician, counselor, general maintenance man, millwright, machinist, welder, and carpenter..." Vocational testing indicated that he was well suited for 35 of the possible 36 occupations considered, including a career as a millwright.¹⁸⁶

176. It appeared that none of the testing completed on Ed Jr. by Walters and Roe was conducted for classification screening rather than diagnostic or therapeutic purposes. Ideally, a mental health assessment would have more appropriately addressed the psychiatric symptoms expressed, the bizarre patterns of behavior, and the many risk factors evident throughout Ed Jr.'s entire life. Thus, the resulting report would have

¹⁸⁵ Psychological Evaluation completed by Jean Ann Walters, USP Prison Psychologist (1/23/76).

ideally addressed the signs and symptoms of mental illness that were evident in order to confirm or adequately rule out major mental illness.

No affirmative diagnostic impressions or analyses despite documented substantial psychiatric symptoms and conditions:

177. Dr. Allan Roe documented Ed Jr.'s emotional and psychiatric symptoms and conditions of distress in a 1975 report. He stated that Ed Jr. was "Quite rigid and negativistic at time" and that he suffered from a "Passive-aggressive personality". Dr. Roe alluded that Ed Jr. was a homosexual in his statements that Ed Jr. had a "Weak masculine identity", that he displayed "Some indication...of a sexual conflict" and that he was "Threatened by females". He also mentioned that Ed Jr. "Takes a superficial look at the world problems..."¹⁸⁷ It appears that Ed Jr. did not receive standard of care treatment while incarcerated at Utah State Prison. Despite all of his symptoms, Dr. Roe only offers brief ambiguous statements regarding Ed Jr. mental illness that are limited in scope to interpersonal and intrapsychic dynamics rather than addressing real patterns of psychiatric symptoms of mental illness. He also does not note that he used Ed Jr. as a pilot subject for his tests.

178. A psychological report completed by Dr. Peck found that Ed Jr. exhibited behaviors of paranoia that were "...due to his past history, past harassment and his own fears". Ed Jr. told Dr. Peck that he "feels that he just cannot survive in the general population."¹⁸⁸ Again, even though there is some question as to whether this fear is real

¹⁸⁶ Prison Records of Edward Schad Jr., chronological notes, Leon Hatch, Director of Education (6/29/70-USP).

¹⁸⁷ 1/75 Report from Dr. Roe

¹⁸⁸ 8/7/75 Report from Dr. Peck

or just a manifestation of his paranoia Dr. Peck does not try to find a definitive answer nor does he recommend any psychological treatment.

179. An unsigned psychological report found that Ed Jr. has an impaired ability to get along with others and exhibited symptoms consistent with "Possible depressive conditions". The report does not discuss the details of this behavior that is symptomatic of a depressive condition. The report also stated that Ed Jr. was "suspicious and paranoid". Again, no detail on how this conclusion was arrived. His homosexuality is again alluded to in this report, "He...has little masculine identity and is threatened by females". The examiner stated that Ed Jr. displayed "Hostile, rigid, negative and sometimes passive-aggressive" behaviors, yet there is not information describing these behaviors. This report also found that Ed Jr. "uses intellectualizing defenses" but no explanation is given. Finally, the examiner stated that Ed Jr.'s, "Greatest weakness being inadequate judgment and obsessive-compulsive tendencies..."¹⁸⁹ Ed Jr. definitely displays inadequate or poor judgment and does so throughout his life. His tendencies, however, are more consistent with mania than they are with obsessive-compulsive disorder.

180. In January of 1976, Dr. Walters found that Edward Jr. was "Easily discouraged, getting moderately depressed..." He displayed "Excessive dependency" on others and "Fundamentally disliked hostility and feelings of subjective discomfort..." Further, Dr. Walters stated that Ed Jr. sets "Rigorous standards of behavior" for himself. His attempts to follow these standards allow him to view himself in an "ideal light." Her conclusion was a "Passive dependent personality with passive-aggressive tendencies."¹⁹⁰

¹⁸⁹ 12/11/75 Psychological Report (unsigned).

¹⁹⁰ Prison Records of Edward Schad Jr., psychological evaluation (Jean Ann Walters, 1/23/76 - USP).

181. The symptoms, behaviors, and conditions listed above are only those documented by overworked custodial staff and many of these could be consistent with several major mental disorders, apparently none of which were ever considered. Among them: Bipolar Disorder; Major Depression or other depressive disorders; Obsessive-Compulsive Disorder; Schizoaffective Disorder; Several of the anxiety disorders; Dissociative disorders; Adjustment disorders.

182. While nowhere in the records was there an affirmative diagnosis of "Homosexuality", Ed Jr. was described as such in documents from Utah State Prison and in some instances, the only clinical interventions recommended by evaluators were unambiguously addressed to that issue. For example the admission summary completed on June 25th 1970 stated under problems that Ed Jr. exhibited, "Homosexual tendencies".

¹⁹¹ An unsigned psychological evaluation recommended that Edward Jr. receive "aversive therapy for his homosexual behavior..."¹⁹² Ed Jr.'s discharge summary stated that he might be attracted to other males and that he has a "weak masculine identity".¹⁹³ Again, interpersonal and intrapsychic dynamics were emphasized at the cost of overlooking psychiatric symptoms of mental illness.

Interviews with the Utah Evaluators:

183. Jay Pultz, an attorney who reviewed Ed Jr.'s Utah Mental Health Records contacted Dr. Roe and Dr. Walters by telephone. Dr. Walters currently goes by her married name Nohava. Dr. Nohava recalled the following:

¹⁹¹ Prison records of Edward Schad Jr., Admission summary, Utah State Prison (6/25/70).

¹⁹² Prison records of Edward Schad Jr., Psychological evaluation, Utah State Prison unsigned (12/11/75).

¹⁹³ Prison records of Edward Schad Jr., Discharge summary, Utah State Prison, Ernest J. Pedler, (7/18/77).

She remembered Edward Schad and confirmed that she had written the 1976 evaluation and addendum. She said she may have evaluated or met with Mr. Schad on other occasions, but inmates were rarely seen by mental health staff on a regular basis. At the time of Mr. Schad's incarceration, the prison was severely understaffed, such that most inmates were seen by mental health staff only upon intake and in conjunction with classification or parole decisions.

Dr. Nohava remembered Mr. Schad because his job assignment was in the Psychology and Research Department. She recalled that Mr. Schad worked closely with Dr. Roe, administering and scoring many of the psychological tests given to other inmates, (This is corroborated by Ed Schad's inmate evaluations from 1976 in which [s]coring various psychological tests" is the first job listed as his "actual work." (See 7/6/76; 8/4/76; 9/9/76; 10/5/76 work reports, USP records) a practice which she feels was improper. She stated that Mr. Schad may have also participated in Dr. Roe's research projects (this statement includes the following footnote: This, too, is corroborated by Mr. Schad's work evaluations. See 9/9/76 work report, USP records.). Dr. Nohava stated that inmates participation in these projects was voluntary, but she believed that many inmates did not feel free to refuse. (Jay Pultz Decl. ¶ 9).

184. Jay Pultz, also spoke with Dr. Allan Roe, a clinical psychologist who worked at Utah State Prison while Ed Jr. was incarcerated there. He provided the following information:

Dr. Roe had left the prison and entered private practice, citing the lack of adequate resources and chronic understaffing at the prison. He was also disappointed by a lack of support for his research. When I asked specifically whether Dr. Roe's research involved plethysmographs [a penile device that measures blood flow to successfully measure the arousal of men in a variety of experiments (Davison & Neale, *supra*, 348.)], "aversive therapy", or other controversial techniques aimed at overcoming (or "curing") homosexuality, he confirmed that it did. He stated his belief that aversive techniques could be effective in treating a broader range of maladaptive behaviors as well. He reported that aversive therapy had been successful in treating compulsive bad-check writers. Dr. Roe also confirmed that, given the prison's financial difficulties, many of the tools and instruments used in the process were produced by inmates in the prison shop.

I mentioned that I heard of psychological tests being administered and scored by inmates as part of his program. He confirmed that this had been the practice for quite some time. He remembered that Mr. Schad enjoyed the process and, for scoring purposes, was quite good with numbers. I noted that his records reflect at least three I.Q. tests while in prison in Utah, with Full-Scale IQ's ranging between

106 and 112. I also stated that I would expect him to perform somewhat higher than that. Dr. Roe agreed, adding that this was especially surprising in Ed's case because: "After all, he's the one who gave himself the test." (Pultz Decl., ¶10).

Ambiguous/vulnerable/undetermined role of Edward Schad Jr. vis-à-vis Dr. Roe:

185. In an effort to better understand Ed Jr.'s relationship with Dr. Allan Roe at the Utah State Prison, I asked him about the context of their relationship. Ed Jr. contended that in addition to the basic tasks identified as his work assignment, he quickly came to work quite closely (i.e. collegially) with Dr. Roe, including participating in several of the doctor's less public research projects. He discussed their relationship as almost a partnership, based on intellectual curiosity and mutual respect. Although he was reluctant to give the details of specific projects in which he was a subject, he suggested that the area being researched was of a fairly intimate nature. When asked directly if their relationship involved sexuality, he neither confirmed nor denied it.

186. Ed Jr. stated that he often spent nights with Dr. Roe in his office. "Roe tested me; I tested Roe." He said they once did a 300 foot drop in Provo together, they went rappelling together, and spent a great deal of time outdoors alone together. Ed Jr. described Roe as a "fabulous man...to me he was really neat." Several minutes later when asked about an unrelated issue, Ed Jr. smiled learned back and responded: "Outstanding man, that Roe. Fabulous. I did all his back-up work for him." It is of course not possible to retrospectively conclude to what extent Ed Jr.'s report reflects Ed Jr.'s own symptomatic grandiosity or inappropriate boundaries on the part of Dr. Roe. The truth probably lies somewhere in the middle.

187. During our interviews, we took infrequent breaks, during the course of which Ed Jr. frequently turned our conversation back to Dr. Roe. Taking his cue, I asked

him about the very first time he met with Dr. Roe. His response was reluctant and somewhat cryptic: "The first project worked on, well, that's a hard one." It took him a while to continue. The project was intended to study "what stressors affected certain tendencies." I asked him to describe the testing that Roe had done on him and he replied: "oh, same thing." I asked if Dr. Roe ever gave him a diagnosis but Ed Jr. did not respond. When asked what he could recall about the psychiatric testing or evaluations he stated that "they kept trying to distinguish me from this category...or narrow the instructions." Ed Jr. claimed to know of no diagnosis assigned to him or even of the job description of any work he had been assigned to perform with Dr. Roe.¹⁹⁴

Edward Schad Jr.'s erratic behavior after his release from Utah State Prison:

188. On July 12, 1977 Ed Jr. was paroled; he moved in with Wilma Erhardt, whom he met in prison, and her two children. From July until December of 1977 Ed Jr. worked for Grand Central Store in Salt Lake City, Utah. A social worker, Mr. Powers, at Utah State Prison who had quite a bit of contact with Ed Jr. during his incarceration noticed a change in Ed Jr. just before his release from prison. According to Mr. Power's testimony, Wilma Ehrhardt had a lot to do with this change:

"her psychological make up was about the worse person that [Petitioner] could become involved with."¹⁹⁵ When the relationship ended between Petitioner and Ehrhardt, Petitioner "was relieved," but then Ehrhardt "made contact with Ed and things were patched up and they resumed their relationship." But once Petitioner was released, he "had a hard time finding any type of occupation," and "ended up working in a rest home." The "cultural shock from living in the prison" and going back to the community with this "very unstable" person gave Petitioner "more additional problems" and was "overbearing."¹⁹⁶

¹⁹⁴ Interview with Edward Schad Jr. by Dr. Charles Sanislow and Jay Pultz, SMU-II, ASP (2/19/2000)

¹⁹⁵ *State v. Schad*, Transcript of Proceedings, p. 63 (Aug. 22, 1985) p. 63

¹⁹⁶ *Id.*, p. 64

After his release from prison, Petitioner contacted Mr. Powers in late 1977. Petitioner was very despondent. He asked Mr. Powers if he could see him for counseling. Mr. Powers explained that he could not help Petitioner now that he was no longer incarcerated.¹⁹⁷

189. In December of 1977, Ed Jr. rented a car in Sandy, Utah, absconded from parole, and drove with Wilma and her kids to Tempe, Arizona. In January of 1978, Ed Jr., Wilma and kids arrived in Syracuse, New York to visit his mother Mabel who still wanted nothing to do with her son. They spent two days at his mother's house then left for Florida where they remained until July. Ed Jr. was only in Salt Lake for a few days before he left again for Arizona.

Edward Schad Jr.'s deterioration and driving spree across the country

190. On August 2, 1978, Ed Jr. began his long period of sheer panic-driven flight in Lorrimar Grove's car that lasted until September 7, 1978, and takes him to and from 28 states.

191. Days that followed the crime of which Ed. Jr. is currently incarcerated for are of particular interest. Ed Jr. picked up a French couple hitchhiking around Chicago, Illinois. According to the French couple, Ed Jr. told them that he came from Arizona where he had seen his father. He left a few days earlier after he and his father got into a fight and had been driving ever since. He told them that he planned to send the Cadillac he was driving to a friend in Germany. Ed Jr.'s behavior with his passengers was extremely odd; he refused to let anyone sit in the back seat and so the three of them squeezed into the front seat the entire time and he often drove through the night without stopping. Out of the blue, Ed Jr. decided that they should see Niagara Falls and so they

¹⁹⁷ *Id.*, p.77-78.

drove there. They then traveled to Syracuse where the French couple believed Ed Jr. had a sister. After Syracuse, Ed Jr. impulsively decided to take them to Lake Placid after hearing one of the French hitchhikers talk about the Olympic Games being held there. They passed through Lake Placid at night, did not stop, and therefore saw nothing of Lake Placid. Upon the hitchhikers insistence Ed Jr. drove toward New York. It was around midnight when they finally stopped in a parking lot because Ed Jr. was tired. The couple asked if they could lie down in the backseat but Ed Jr. refused. The French couple started to worry as they realized that something was wrong with Ed Jr. At around 5 am they started driving again; Ed Jr. stated that he would not set foot in New York City so he dropped them off at a bus station in Albany, New York.¹⁹⁸

192. Ed Jr. was arrested in Salt Lake City, Utah on September 8, 1978 for a violation of his parole. He was later charged with the murder of Lorrimar Grove and was transferred to Yavapai County, Arizona.

Arrest for Arizona Crime

193. On December 14, 1978 a felony grand jury indicted Edward Schad, Jr. for the murder of Lorrimar Grove on or about August 1, 1978.¹⁹⁹ According to the Yavapai County Sheriff's Office on August 9, 1978 learned of an unidentified decomposed male body found near Prescott, Arizona. On October 11, 1978 the body was identified as Lorimer [sic] Leroy Grove, a 74 year-old man from Bisbee, Arizona. An autopsy revealed that the cause of death was asphyxiation by ligature strangulation. According to the state, Grove left Bisbee on August 1, 1978 on his way to Everett, Washington in a

¹⁹⁸ Letter from B. Dupety sent March 23, 1985, translated by Anne-Marie Engels-Brooks (1/9/99).

¹⁹⁹ Probation Records of Edward Schad Jr., Yavapai County, Adult Probation Department (11/2/79).

1978 Cadillac and pulling a travel trailer. The travel trailer was never found.²⁰⁰ In a statement given by Ed Jr. his speech is of particular interest:

...In today's system, power and money are the only two things that count. By power I mean job wise. The hard and sad part of it is that once your caught up in this system of ours, and you don't have the power or money, then there is no way to fight back. It's truly a one way broadway road...²⁰¹

The social history section of Ed Jr.'s probation report revealed that his father was an alcoholic who physically beat his children and his wife.²⁰² In 1968, Ed Jr. stated that he had an ulcer, wears glasses, and has full upper dentures.²⁰³ Ed Jr. also stated that he is a very depressed person and that he visited a psychologist regularly while incarcerated in the Utah State Prison.²⁰⁴ In 1985, a probation report revealed that Ed Jr. was a "shy, withdrawn adolescent."²⁰⁵

Conclusion:

194. Ed Jr. exhibited many symptoms indicative of a severe and chronic mental illness. His history of abuse, neglect, and abandonment cannot be ruled out as playing a significant factor in Ed Jr.'s psychiatric and behavioral functioning as an adult.

195. Throughout his entire life, Ed Jr. has a pattern of repeating lifelong, astonishingly self-defeating behaviors: He repeatedly attempted to return home to his mother in North Syracuse despite her clear refusal to see him and consistent rejection (he

²⁰⁰ Probation Records of Edward Schad Jr., Yavapai County, Adult Probation Department (11/2/79).

²⁰¹ Probation Records of Edward Schad Jr., Yavapai County, Defendant's statement, Adult Probation Department (11/2/79).

²⁰² Probation Records of Edward Schad Jr., Yavapai County, Social History, Adult Probation Department (11/2/79).

²⁰³ Probation Records of Edward Schad Jr., Yavapai County, Physical Health, Adult Probation Department (11/2/79).

²⁰⁴ 1979 PSR

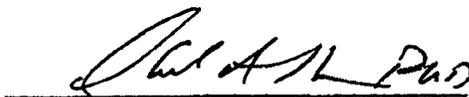
²⁰⁵ 1985 PSR

returns to her five to six times during his five week driving just before he was arrested for Mr. Grove's murder). He antagonized the few relatives who will see him at all; his uncle in California and his great-aunt in Mattydale all agree to see him and he forged checks against their accounts, stealing money from them to pay for his "spending sprees."

196. His behavior is consistent with mental illness in the affective spectrum, specifically some type of bipolar affective illness. Throughout his life, he has often exhibited symptoms of paranoia, anxiety, and mania, and his presentation is complicated by his history of trauma. Signs of a thought disturbance are at times present in his speech patterns; he perseverates, displays impoverished speech, and has a limited range of affect. The passive-dependent traits that Dr. Walter described in her psychological evaluation are likely accompaniments to chronic mental illness but do not capture the complete diagnostic picture. In addition to manic symptoms, he displays classic signs of chronic depression including, a foreshortened sense of future. When not defending against depression with an energized, overly optimistic or manic state, hopelessness and helplessness are evident and appear to overwhelm him by disorganizing his thoughts and speech patterns.

197. Ed Jr.'s tendency to deny any psychological distress and conceal his psychopathology, just as he learned that he had to as a child, is understandable and recognized as adaptive. In fact this behavior is termed "smiling depression." It is tragic that there was no one able or available to intervene in Ed Jr.'s stressful, traumatic, and disordered family situation during his life. It is equally tragic that his symptoms of mental illness and clear patterns of disturbed behavior were not better recognized during the many institutional contacts that he endured throughout his life.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and was executed on August 12, 2004 in the county of New Haven, Connecticut.



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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Edward Harold Schad,
Petitioner,
-vs-
Charles Ryan, et al.,
Respondents.

CV 97-2577-PHX-ROS
CAPITAL CASE
RESPONSE TO MOTION FOR
RELIEF FROM JUDGMENT
PURSUANT TO FED. R. CIV.
P. 60(b)

Citing Rule 60(b)(6), Federal Rules of Civil Procedure, Petitioner Edward Harold Schad seeks relief from this Court’s judgment entered on September 28, 2006 (Doc. No. 121), based on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). However, Schad is simply asking this Court to “revisit an argument” that the Ninth Circuit has “already explicitly rejected.” *Schad v. Ryan*, 133 S. Ct. 2548 (2013). Because that determination is the law of the case, Schad’s Rule 60 motion must fail.

DATED this 6th day of September, 2013.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY.

The Supreme Court's recent unanimous *per curiam* opinion, which summarily reversed the Ninth Circuit's granting Schad relief pursuant to *Martinez*, summarized the procedural history of this case:

In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of 74-year-old Lorimer Grove. [footnote omitted]. The court sentenced respondent to death. After respondent's conviction and sentence were affirmed on direct review, *see State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), respondent again sought state habeas relief, alleging that his trial counsel rendered ineffective assistance at sentencing by failing to discover and present sufficient mitigating evidence. The state courts denied relief.

In August 1998, respondent sought federal habeas relief. He again raised a claim of ineffective assistance at sentencing for failure to present sufficient mitigating evidence. The District Court denied respondent's request for an evidentiary hearing to present new mitigating evidence, concluding that respondent was not diligent in developing the evidence during his state habeas proceedings. *Schad v. Schriro*, 454 F.Supp.2d 897 (D.Ariz.2006). The District Court alternatively held that the proffered new evidence did not demonstrate that trial counsel's performance was deficient. *Id.*, at 940–947. The Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for a hearing to determine whether respondent's state habeas counsel was diligent in developing the state evidentiary record. *Schad v. Ryan*, 606 F.3d 1022 (2010). Arizona petitioned for certiorari. This Court granted the petition, vacated the Ninth Circuit's opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 563 U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *See Ryan v. Schad*, 563 U.S. —, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). On remand, the Ninth Circuit affirmed the District Court's denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708, 726 (2011). The Ninth Circuit subsequently denied a motion for rehearing and rehearing en banc on February 28, 2012.

On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to

vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in *Martinez v. Ryan* [citation and footnote omitted]. The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U.S. —, 133 S.Ct. 432, 184 L.Ed.2d 264, and denied a petition for rehearing on January 7, 2013. 568 U.S. —, 133 S.Ct. 922, 184 L.Ed.2d 713.

Respondent returned to the Ninth Circuit that day and filed a motion requesting a stay of the mandate in light of a pending Ninth Circuit en banc case addressing the interaction between Pinholster and *Martinez*. The Ninth Circuit denied the motion on February 1, 2013, "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." Order in No. 07-99005, Doc. 102, p.1. But instead of issuing the mandate, the court decided sua sponte to construe respondent's motion "as a motion to reconsider our prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez*," which the court had denied on July 27, 2012. *Id.*, at 2. The court ordered briefing and, in a divided opinion, remanded the case to the District Court to determine whether respondent could establish that he received ineffective assistance of postconviction counsel under *Martinez*, whether he could demonstrate prejudice as a result, and whether his underlying claim of ineffective assistance of trial counsel had merit. No. 07-99005 (Feb. 26, 2013), App. to Pet. for Cert. A-13 to A-15, 2013 WL 791610, *6. Judge Graber dissented based on her conclusion that respondent could not show prejudice. *Id.*, at A-16 to A-17, 2013 WL 791610, *7. Arizona set an execution date of March 6, 2013, which prompted respondent to file a motion for stay of execution on February 26, 2013. The Ninth Circuit panel granted the motion on March 1, 2013, with Judge Graber again noting her dissent.

On March 4, 2013, Arizona filed a petition for rehearing and rehearing en banc with the Ninth Circuit. The court denied the petition the same day, with eight judges dissenting in two separate opinions. 709 F.3d 855 (2013).

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This Court denied the application, with Justices SCALIA and ALITO noting that they would grant it. 568 U.S. —, 133 S.Ct. 2548, 186 L.Ed.2d 644, 2013 WL 3155269 (2013).

Ryan v. Schad, 133 S. Ct. 2548, 2549-2550 (2013).

The Supreme Court granted Arizona's petition for certiorari seeking review of the Ninth Circuit's order of February 26, 2013. *Id.* at 2550. Its subsequent opinion noted that the Ninth Circuit had denied Schad's *Martinez* motion on July 27, 2012, and stated: "[t]here is no doubt that the arguments presented in the rejected July 10, 2012, motion were *identical to those accepted by the Ninth Circuit the following February.*" *Id.* at 2551 (emphasis added). The Supreme Court found the Ninth Circuit abused its discretion by: not issuing the mandate after the Supreme Court denied certiorari review, reconsidering its previous denial of the *Martinez* motion, and remanding to the district court for *Martinez* proceedings. *Id.* at 2551-2552. It concluded, "there is no indication that there were *any extraordinary circumstances* here that called for the court to revisit an argument *sua sponte that it already explicitly rejected.*" *Id.* at 2552 (emphasis added). Accordingly, the Court reversed the Ninth Circuit's judgment of February 26, 2013, and remanded with instructions for the Ninth Circuit to issue the mandate "immediately and without any further proceedings." *Id.*

Petitioner filed a petition for rehearing, which the Court denied on August 30, 2013. (Supreme Court Docket in 12-1084).

On September 3, 2013, the Arizona Supreme Court granted the State's Motion for Warrant of Execution, setting the execution date of October 9, 2013.

On September 4, 2013, the Ninth Circuit issued a mandate order stating: "pursuant to this Court's third amended opinion of November 10, 2011, the district court's September 29, 2006 judgment is affirmed in all respects."

II. THE LAW OF THE CASE PRECLUDES RULE 60(B) RELIEF.

In seeking Rule 60(b) relief, Schad primarily relies on the order from the Ninth Circuit dated February 26, 2013, which was reversed by the Supreme Court. However, as discussed above, the Ninth Circuit's mandate order specifies that it is

from the third amended opinion, upholding this Court's judgment. The third amended opinion and the order rejecting Schad's *Martinez* claim are the "law of the case." Accordingly, this Court must reject Schad's request to have this Court revisit the already-decided *Martinez* issue under the guise of a Rule 60(b) motion.

"The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Harrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). *See also United States v. Cade*, 236 F.3d 463, 467 (9th Cir. 2000) (law of the case "requires courts to follow a decision of an appellate court on a legal issue in all later proceedings in the same case."); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972) ("The law in this circuit is clear that when a matter has been decided adversely on appeal from a conviction, it cannot be litigated again on a 2255 motion").

A more specific aspect of the law of the case doctrine is the "rule of mandate doctrine," which provides that, "When a case has been once decided by this court on appeal, and remanded to the [district court], whatever was before this court, and disposed of by its decree, is considered as finally settled. The [district court] is bound by the decree as the law of the case, and must carry it into execution according to the mandate." *United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007) (quoting from *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)). A district court cannot revisit its already final determinations unless the mandate allows it. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir 1995).¹

The Ninth Circuit's third amended opinion affirmed this Court's judgment,

¹ Moreover, the denial of the *Martinez* claim is *res judicata*. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 fn. 6 (1982). Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Id.*

which rejected Claim P. *Schad v. Ryan*, 671 F.3d 708, 722 (9th Cir. 2011). And the Supreme Court noted that the Ninth Circuit's Order of July 27, 2012, "explicitly rejected" Schad's *Martinez* argument. *Ryan v. Schad*, 133 S. Ct. at 2552. Thus, under the law of the case doctrine and the law of the mandate doctrine, this Court cannot reconsider the *Martinez* issue already rejected by the Ninth Circuit.

Schad proceeds as though the Ninth Circuit's reversed order of February 26, 2013, and the related mandate control this Court's decision on the current motion. However, that vacated order and mandate are not the law of the case. *See Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989) ("because the Supreme Court heard this case on certiorari and reversed, the mandate in our original decision never took effect.") (citing 1B MOORE, LUCAS, CURRIER, MOORE'S FEDERAL PRACTICE, ¶ 0.404[5.-3].).

Again citing the recently-reversed order from the Ninth Circuit, Schad argues that *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), does not prevent this Court from reconsidering Claim P. (Motion, at 5-6.) However, the dispositive decision on Claim P is the Ninth Circuit's third amended opinion, which recognized that *Pinholster* controls this issue, found that the state courts did not unreasonably apply *Strickland* in rejecting the IAC sentencing claim presented in Claim P, and affirmed this Court's denial of Claim P. *Schad v. Ryan*, 671 F.3d at 722. The Ninth Circuit's holding that *Pinholster* controls the analysis of Claim P cannot be reconsidered by this Court. Moreover, the Ninth Circuit has recently reiterated that *Pinholster* applies when a claim had been adjudicated on the merits in state court. *Detrich v. Ryan*, 2013 WL 4712729, *7 (9th Cir. Sept. 3, 2013). Thus, this Court can neither reconsider its previous rejection of Claim P nor reconsider the re-proffered declaration from Dr. Charles Sanislow. (Motion, Attachment C.)

III. EVEN IF THIS COURT COULD RECONSIDER ITS JUDGMENT, *MARTINEZ* DOES NOT APPLY BECAUSE THERE WAS NO PROCEDURAL DEFAULT ON CLAIM P.

The law of the case aside, *Martinez* does not even apply to Claim P, because this Court did not find a procedural default that could be excused under *Martinez*. Rather, it analyzed Claim P on the merits, both in view of the state court record and additional material submitted to this Court in the federal habeas proceeding. *See Schad v. Schriro*, 454 F.Supp.2d 897, 936-944 (D. Ariz. 2006). As the Ninth Circuit recently made clear in *Detrich*, “*Martinez* does not apply to claims that were not procedurally defaulted, but were, rather, adjudicated on the merits in state court.” 2013 WL 4712729, at *7 (plurality opinion). *See also id.* at *28 (J. Graber dissenting) (holding of *Martinez*—that procedural default of an IAC claim can be excused if it was due to PCR counsel’s ineffectiveness—“has no application when the claim was *not defaulted.*”) (emphasis in original).

The reversed Ninth Circuit order of February 26, 2013, *sua sponte* found a procedural default on the IAC-sentencing claim, on the theory that Schad had presented the district court with a “new” claim of IAC at sentencing for not presenting mental health evidence, a claim distinct from the claim adjudicated in the state courts, ineffective assistance of counsel at sentencing for not developing and presenting mitigation. *Schad v. Ryan*, 2013 WL 791610, **5-6 (9th Cir. 2013). First, even assuming *arguendo* that the new evidence first introduced in federal habeas somehow transformed the IAC-sentencing claim rejected by the state courts into a new or additional IAC claim, this Court rejected that “new” IAC-sentencing claim *on the merits* because it found the new evidence neither showed deficient performance nor prejudice. *Schad v. Schriro*, 454 F.Supp.2d at 940-944. *See Stokley v. Ryan*, 659 F.3d 802, 808 (9th Cir. 2011) (prisoner not entitled to relief either under *Pinholster* review or “if we construe his federal claim as unexhausted such that we may consider the supplemental evidence he offered to the district court.”). Second, the new evidence did not create a new claim, for, as stated by the

Supreme Court: “the only claim presented [in the July 10, 2012, motion] was that respondent’s postconviction counsel *should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim.*” *Ryan v. Schad*, 133 S. Ct. at 2552 (emphasis added).

The applicability of *Pinholster*, rather than *Martinez*, to this case is made manifest by Chief Judge Kozinski’s dissenting opinion from the Ninth Circuit’s reversed opinion in *Pinholster*. Chief Judge Kozinski opined that the Ninth Circuit’s habeas review should have been limited to the record presented in the state habeas petition. *Pinholster v. Ayers*, 590 F.3d 651, 688-690 (9th Cir. 2009) (C.J. Kozinski, dissenting). The dissent warned:

This is the most dangerous part of the majority opinion as it blots out a key component of AEDPA. *The statute was designed to force habeas petitioners to develop their factual claims in state court.* [citation omitted]. The majority now provides a handy-dandy road map for circumventing this requirement: *A petitioner can present a weak case to the state court, confident that his showing won't justify an evidentiary hearing. Later, in federal court, he can substitute much stronger evidence and get a district judge to consider it in the first instance, free of any adverse findings the state court might have made.* I don't believe that AEDPA sanctions this bait-and-switch tactic, nor will it long endure.

590 F.3d at 690 (emphasis added).

Thus, when the Supreme Court considered *Pinholster*, it was in a similar posture to *Schad*’s case. California contended there “that some of the evidence adduced in the federal evidentiary hearing *fundamentally changed* *Pinholster*’s claim so as to render it effectively unadjudicated.” 131 S. Ct. at 1402 n.11 (emphasis added). *Pinholster* argued that the additional evidence that had not been part of the claim in state court “simply support[ed]” his alleged claim. *Id.* The Supreme Court rejected *Pinholster*’s argument:

We need not resolve this dispute because, even accepting *Pinholster*’s position, he is not entitled to federal habeas relief.

Pinholster has failed to show that the California Supreme Court unreasonably applied clearly established federal law on the record before that court, [citing the opinion], which *brings our analysis to an end*. Even if the evidence adduced in the District Court additionally supports his claim, as Pinholster contends, *we are precluded from considering it.*”

Id. (emphasis added.)

In *Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir. 2012), the Ninth Circuit noted the problem with the theory that new evidence makes a new claim:

Lopez argues that it is but a small expansion of *Martinez* to hold that the “narrow exception” in *Martinez* necessarily applies not only to PCR counsel's ineffective failure to raise a claim (the subject of procedural default) but also to PCR counsel's ineffective failure to develop the factual basis of a claim (the subject of § 2254(e)(2)). We need not decide whether Lopez is correct, though we do note tension between his theory and the Supreme Court's jurisprudence in this area, *see, e.g., Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011).

Schad discusses at some length an unpublished opinion from the Fourth Circuit, *Moses v. Branker*, 2007 WL 3083548 (4th Cir. Oct. 23, 2007). (Motion, at 21-23.) First an unpublished decision is not even binding precedent in the Fourth Circuit. *See Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334, 338 (4th Cir. 2009). Second, *Moses* is both pre-*Pinholster* and pre-*Martinez*. Third, to the extent *Moses* relies on *Vasquez v. Hillery*, 474 U.S. 254 (1986), for the proposition that a habeas petitioner who presents facts that “fundamentally alter” a claim has not properly exhausted the altered claim and is subject to procedural default, that reliance is no longer valid under *Pinholster*, for the reasons discussed above. Fourth, unlike the present case, the district court in *Moses* actually *found a procedural default*, and that finding was upheld by the Fourth Circuit. *Moses*, at **2-3. Fifth, the Fourth Circuit ultimately found *Moses* had not set forth a sufficient basis to excuse his procedural default on his claim that trial

counsel failed to adequately investigate mitigating circumstances at sentencing. *Id.* at *3.

Schad also cites *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012). But the Ninth Circuit granted rehearing *en banc*, and ordered: “The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.” *Dickens v. Ryan*, 704 F.3d 816, 817 (9th Cir. 2013).

Schad argues that, when this case was previously before this Court, Respondents argued that the proffered new evidence placed the claim in a significantly different posture, and thus made it not fairly exhausted and procedurally defaulted. (Motion, at 21.) But Respondents made that argument when they thought, like California in *Pinholster*, that *Hillery* set forth the proper analysis, but the Supreme Court clarified in *Pinholster* that a federal court must decide the IAC claim on the state court record. *See Pinholster*, 131 S. Ct. at 1402 n.11. Also, this Court *rejected* Respondents’ procedural default theory and proceeded to analyze Claim P on the merits, and alternatively considered the newly-proffered habeas evidence. Finally, even if *Hillery* were still good law, it would not aid Schad because the essence of his federal claim—that counsel provided ineffective assistance at sentencing by failing to adequately investigate and present mitigating evidence—was the same claim he presented to the state PCR court. *See Stokley*, 659 F.3d at 809.

Through his new evidence/new claim theory, Schad attempts to manufacture a procedural default to be used as a sword against Respondents’ interest in finality. That is a perverse use of the affirmative defense of procedural default. *See generally Trest v. Cain*, 522 U.S. 87, 89 (1997). *Cf. Wood v. Milyard*, 132 S. Ct. 1826, 1834-35 (2012) (abuse of discretion for appellate court to find procedural default not found by district court).

Finally, Schad attempts to manufacture a different procedural default on this

claim by erroneously claiming that, when he reasserted this issue in his most recent state PCR, the state court found it precluded under Rule 32.2(a)(3). He argues that the preclusion finding was made because the claim had *not* been previously raised, thereby showing that the state court found the new evidence constituted a new claim. (Motion, at 24.) To the contrary, the state PCR court found the claim barred precisely because it *had been raised* in Schad's first Rule 32 petition. (Motion, Attachment A, at page four.) Moreover, the state court specifically agreed with the Ninth Circuit's analysis of the same claim in the third amended opinion. *Id.*, citing *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011). Thus, the most recent state PCR ruling confirms that Schad has made only one IAC-sentencing claim, which was rejected on the merits by the state courts.

IV. EVEN IF THIS COURT WERE FREE TO CONDUCT A *MARTINEZ* ANALYSIS, SCHAD WOULD NOT PREVAIL.

Furthermore, even if this Court could reconsider the issue and even if *Martinez* could apply, he cannot satisfy its requirements. *See Miles v. Ryan*, 713 F.3d 477, 494-495 (9th Cir. 2013). *Martinez* requires a prisoner to make a substantial showing on four separate points: (1) trial counsel's performance was constitutionally deficient, (2) trial counsel's deficient performance was prejudicial, (3) PCR counsel's performance was constitutionally deficient, and (4) PCR counsel's deficient performance prejudiced the prisoner's case. *See, e.g., Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).

Schad's IAC-sentencing claim is not substantial. *See, e.g., Leavitt v. Arave*, 682 F.3d 1138, 1140-41 (9th Cir. 2012) (*per curiam*). This Court previously found that Schad had not "demonstrated that trial counsel's performance at sentencing was either deficient performance or prejudicial." *Schad v. Schriro*, 454 F. Supp.2d at 941. Because this Court has already found the underlying IAC-sentencing claim to be meritless, there is no reason to re-analyze whether the claim is "substantial" under *Martinez*.

Schad does not show why this Court should reconsider its decision, even if it were inclined to do so. “To establish deficient performance, a person challenging a conviction must show that ‘counsel’s representation fell below an objective standard of reasonableness.’” *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). “[T]he standard for judging counsel’s representation is a most deferential one.” *Id.* The Ninth Circuit’s third amended panel opinion noted that sentencing counsel filed a 39-page sentencing memorandum proffering 12 mitigating circumstances and presented testimony at sentencing from 15 witnesses, “including correctional officers, friends, relatives and a psychiatrist.” *Schad v. Ryan*, 671 F.3d at 718-719. It further noted that the pre-sentence report prepared by a probation officer “included discussions of Schad’s troubled childhood, favorable character reports from several of Schad’s friends and Arizona prison officials, and Schad’s good behavior and achievements in prison.” *Id.* at 719. This Court’s decision noted that counsel also proffered as in mitigation expert psychiatric testimony that Schad was not a violent individual. *Schad v. Schriro*, 454 F.Supp.2d at 941, fn.28. In rejecting Claim P, this Court concluded that counsel reasonably chose the strategy of showing that Schad was basically a good man, who would benefit from rehabilitation; arguing that he was of “good or stable character.” *Schad v. Schriro*, 454 F.Supp.2d at 941. *See Miles*, 713 F.3d at 491 (failure to investigate social history further was reasonable when strategy was to show prisoner was a relatively normal person, and additional social history was irrelevant to chosen strategy).

Strickland itself supports this Court’s denial of relief on Claim P:

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent’s wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. [citation omitted] Nor did he request a psychiatric examination, since his conversations with his

client gave no indication that respondent had psychological problems. [citation omitted].

Strickland, 466 U.S. 672-73. The Supreme Court held that, under these circumstances, the attorney's performance was neither deficient under the prevailing norms nor prejudicial: "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure." *Id.* at 700. The Court found no prejudice even though his attorney failed to offer any mitigating evidence, although fourteen friends and relatives of the capital murder defendant were willing to testify that he was "generally a good person," and unoffered medical reports described defendant as "chronically frustrated and depressed because of his economic dilemma." *Id.*

Even considering the new evidence first presented in federal habeas proceedings, Schad has not shown a substantial claim of deficient performance under *Strickland*. See *Miles*, 713 F.3d at 494-95 (*Martinez* did not help prisoner because new evidence uncovered during federal habeas proceedings was insufficient to demonstrate that his lawyer's investigation during the state-court proceedings was unreasonable); *Cook v. Ryan*, 688 F.3d 598, 612 (9th Cir. 2012) (finding support for denial of Rule 60(b) relief where petition failed to set forth a substantial claim of either deficient performance or prejudice by pretrial counsel); *Stokley*, 659 F.3d at 809 ("Even considering the new evidence, we conclude that *Stokley* has not presented a colorable claim of ineffective assistance of counsel.").

Even if Schad had offered all of the evidence he later submitted in federal court, it would not have mattered because this Court found it was cumulative to what was already presented: "The affidavits submitted by family members and psychologists repeat, rather than corroborate or elaborate on, the specific details of abuse included in the presentence report." *Schad v. Schriro*, 454 F.Supp.2d at 943. This Court specifically addressed Dr. Sanislow's declaration, "when documenting

the abuse Petitioner suffered,” frequently relied “on the details contained in the presentence report.” *Id.* at 943. This Court found the new material “is either cumulative or, . . . , contradictory to the portrait of Petitioner that trial counsel presented at sentencing.” *Id.* at 944. *See Miles*, 713 F.3d at 492-94 (finding that the addition, during post-conviction proceedings of cumulative mitigating evidence relating to social history was insufficient to demonstrate prejudice even under *de novo* review). *See also Wong v. Belmontes*, 558 U.S. 15, 23 (2009) (“Additional evidence on these points would have offered an insignificant benefit, if any at all.”); *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (“the mitigating evidence he [Landrigan] seeks to introduce would not have changed the result.”); *Bible v. Ryan*, 571 F.3d 860, 871-72 (9th Cir. 2009).

Because there is no underlying substantive IAC issue, Schad cannot prevail under a *Martinez* analysis. But, additionally, Schad has failed to show PCR counsel rendered deficient performance or that any deficient performance by PCR counsel prejudiced Schad.

Schad argues that Respondents have conceded that PCR counsel was deficient (Motion, at 25-26), but that is not true. Rather, Respondents argued that Schad was not diligent in presenting additional facts to the state PCR court, which is a different analysis based on 28 U.S.C. Section 2254(e)(2), not *Strickland*. Diligence concerns *how* a claim was presented, not whether counsel was deficient under *Martinez* for not raising a claim. Moreover, the Ninth Circuit, in its second amended opinion, *Schad v. Ryan*, 606 F.3d 1022, 1043 (9th Cir. 2010), did not find PCR counsel deficient, but rather found that “Schad’s legal team attempted in state court to develop a factual basis for his ineffective assistance claim, but faced several obstacles.” This Court then listed the difficulties faced by PCR counsel. *Id.* Accordingly, it simply cannot be said that “Petitioner’s postconviction counsel performed his duties so incompetently as to be outside the ‘wide range of

professionally competent assistance.” *Miles*, 713 F.3d at 494, quoting *Strickland*, 466 U.S. at 690.

Moreover, Schad cannot make a substantial showing of prejudice from any deficiency by PCR counsel. This Court has already considered the new evidence Schad first presented in federal habeas review, that Schad argues sentencing or PCR counsel should have presented in state court proceedings. It found that “even if Petitioner had been diligent [in state PCR proceedings] and the new materials were properly before this Court, Claim P is without merit. *Schad v. Schriro*, 454 F.Supp.2d at 940. It concluded: “Despite Petitioner’s failure to develop these facts in state court, the Court has considered these materials and concludes that the trial court’s denial of Petitioner’s sentencing-stage IAC claim was not an unreasonable application of clearly established federal law as set forth in *Strickland*. Petitioner is not entitled to relief on Claim P.” *Id.*

There is no reason for this Court to reconsider evidence it has already considered regarding Claim P, but found did not establish a *Strickland* claim.

V. RULE 60(B)(6) AND THIS CLAIM.

Finally, Schad argues that the issuance of *Martinez* constitutes extraordinary circumstances sufficient for this Court to reopen its final judgment pursuant to Rule 60(b)(6). In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court held that a motion pursuant to Rule 60(b) filed in federal habeas proceedings is subject to AEDPA’s requirements for successive petitions under 28 U.S.C. § 2244(b). *Id.* at 531. When seeking relief under Rule 60(b)(6), a prisoner must show “extraordinary circumstances” justifying the reopening of a final judgment. *Id.* at 535. *See also Ackermann v. United States*, 340 U.S. 193, 199 (1950) (requiring a showing of “extraordinary circumstances” before a final judgment may be reopened). *Gonzalez* concluded that the prisoner had not asserted “extraordinary circumstances” justifying relief. *Gonzalez*, 545 U.S. at 538.

Rule 60(b) does not allow a party to reassert a claim that has been explicitly rejected by the federal appellate court. Because the Ninth Circuit has previously rejected the *Martinez* argument, Schad cannot show extraordinary circumstances that would allow this Court to reconsider its judgment.

Schad argues that, to determine whether there are extraordinary circumstances, this Court should employ the Ninth Circuit's test from *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). When a *Martinez* issue is intertwined with a Rule 60(b) motion, the federal court normally has some "leeway as to how to approach" the federal habeas case. *See Lopez*, 678 F.3d at 1135. However, the "extraordinary circumstances" analysis cannot aid Schad here.

First, the United States Supreme Court, assuming *arguendo* that the Ninth Circuit had the power not to issue the mandate following certiorari denial, found that the proposed reconsideration of the previously-rejected *Martinez* claim was not an "extraordinary circumstance" and therefore the Ninth Circuit abused its discretion in staying the mandate and reconsidering the argument it had "already explicitly rejected." *Ryan v. Schad*, 133 S. Ct. at 2549 & 2552. Thus, the issuance of *Martinez* cannot now be an "extraordinary circumstance" that would allow this Court to reconsider its prior judgment. Moreover, the "law of the case" bars Schad from litigating the *Martinez* issue under the guise of a Rule 60 motion.

Second, unlike *Lopez*, where the *Martinez* claim was being presented to the federal courts for the first time in a Rule 60 motion, Schad presented the issue to the Ninth Circuit after the third amended opinion, and that court summarily rejected it, after which the Supreme Court denied his petition for certiorari review based on *Martinez*. *See Lopez*, 678 F.3d at 1136 ("Until the Supreme Court decided *Martinez* after *Lopez*'s federal proceedings had become final, *Lopez* had never pursued the theory that he now advances.).

Third, *Lopez* found there was no substantial underlying IAC issue that would

permit relief from a final judgment. 678 F.3d at 1137-1139. As discussed above, this Court already considered the new evidence Schad first proffered in federal habeas, but still found no prejudice because the new evidence would not have changed the sentence. 454 F. Supp.2d at 944. *Cf. Lopez*, 678 F.3d at 1139 (“Even accepting and reviewing de novo Lopez’s late-offered evidence at the first habeas proceeding, Lopez fails to meet the *Martinez* test of substantiality as to prejudice.”).

Fourth, in *Phelps*, the Ninth Circuit agreed that the law had changed *after* the Ninth Circuit affirmed the dismissal of his habeas petition. 569 F.3d at 1129. In this case, by contrast, the Ninth Circuit had the opportunity to consider the *Martinez* argument, but summarily denied it. Moreover, *Lopez* distinguished *Phelps*, on the basis that the “connection between the intervening change of law and Lopez’s case is not as straightforward.” 678 F.3d at 1137. Also, because Lopez did not present a substantial underlying claim of ineffective assistance, the Ninth Circuit declined to reopen his habeas case under Rule 60. *Id.* See also *Styers v. Ryan*, 2013 WL 149919, at *11 (D. Ariz. Mar. 20, 2013) (prisoner’s *Martinez* motion failed to demonstrate requisite extraordinary circumstances necessary to warrant relief under Rule 60(b)(6)).

VI. CONCLUSION.

For the above reasons, Respondents respectfully request this Court to deny Schad’s Rule 60(b)(6) motion.

Respectfully submitted,

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I hereby certify that on September 6, 2013, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

*****DEATH PENALTY CASE***
EXECUTION SCHEDULED OCTOBER 9, 2013 10:00 A.M.**

EDWARD HAROLD SCHAD,)	
)	
Petitioner,	)	CIV-97-2577-PHX-ROS
)	
vs.)	
)	
CHARLES RYAN, et al.,	)	REPLY TO RESPONSE
	)	MOTION FOR RELIEF FROM
Respondents.	)	JUDGMENT PURSUANT TO
	)	FED. R. CIV. P. 60(b)

The Ninth Circuit has a test for determining when a district court may entertain a motion pursuant to Fed. R. Civ. P. 60(b) in a habeas context. *Phelps v. Alameida*, 569 F.3d 1120, 1141 (9th Cir. Cal. 2009). Petitioner filed his motion in accordance with that test and set out how each prong favored his motion. Docket Entry No. 145, Motion, pp.

28-38. But Respondent substantially ignores the *Phelps* factors, giving them mere lip-service. Docket Entry No. 147, Response, pp. 16-17. To the extent that Respondent failed to address a prong of *Phelps*, that prong should be viewed as conceded and weighed in favor of Schad.¹ Schad will address Respondent's arguments in the order he presented them. It should be noted at the outset that Respondent's position hinges on his argument that the United States Supreme Court decision that the Ninth Circuit did not have the authority to withhold the mandate in this case prevents this Court from considering Schad's motion under 60(b). If he is mistaken, and he is, then Schad's motion is well-taken. It is.

I. THE LAW OF THE CASE DOES NOT PRECLUDE RELIEF; RESPONDENT'S INTERPRETATION OF THE HOLDING IN *SCHAD V. RYAN*, 133 S.CT. 2548 (2013) IS MISTAKEN AT BEST, DISINGENUOUS AT WORST

Respondent spends the vast majority of his response repeating his argument that the Ninth Circuit has already decided the question of the applicability of *Martinez* to Schad's claim by its July, 2012, order denying Schad's Motion to Remand his Appeal to the District Court. The problem with Respondent's argument is that the Court's 2012 order did not address whether, if at all, *Martinez* applied to Schad's case. The order simply denied a procedural request. Schad asked for a remand in a post-rehearing motion. The panel denied the request to remand the case. They did so in an unexplained order. The Order reads: "The petitioner-appellant's Motion to Vacate Judgment and Remand to the District Court is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Enty No. 90.

¹ Respondent ignored the following four of six factors: Diligence, Reliance, Delay, and Comity.

On its face, the order is one denying a procedural request rather than a ruling on the merits of the application of Martinez to Schad's claim.² The order is both reasonable and sensible in light of the procedural history in Schad's case. After issuing its opinion in 2011, The Court initially refused to entertain a petition for rehearing in Schad's case. "Petitioner-appellant's motion for leave to file petition for rehearing and rehearing en banc is DENIED." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 80. Petitioner successfully obtained a reversal of that order and an en banc petition was filed. A response to the petition was ordered. The Petition was ultimately denied. In it February 28, 2012, order denying Petitioner's request for rehearing and rehearing en banc, the Court explicitly warned, "Further petitions for rehearing and rehearing en banc **shall not be entertained**." *Schad v. Ryan*, No. 07-99005, Docket Entry No. 86 (emphasis added).

The order denying Schad's request to vacate the court's opinion and remand the case cannot be fairly construed as law of the case, or *res judicata*.

Further, the Supreme Court's recent opinion in Schad's case cannot be fairly construed as commenting on the availability of equitable relief under Rule 60(b). The Supreme Court was asked to review the Ninth Circuit's deviation from normal mandate procedures. The Court began its analysis of this sole issue by noting that the default rule is "[t]he court of appeals *must issue the mandate immediately* when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." *Ryan v. Schad*,

² Respondent opposed the motion on procedural grounds. *Schad v. Ryan*, No. 07-99005, Docket Entry No. 90, Response, pp. 2-3 (arguing that the motion to vacate is an unauthorized and untimely second petition for rehearing).

132S.Ct. 2548, 2550 (2013), *quoting* Fed. R. App. P. 41 (d)(2)(D)(emphasis added by the Court). The Court went on to emphasize that “[d]eviation from normal mandate procedures is a power of ‘last resort, to be held in reserve against grave, unforeseen contingencies.’” *Id.* at 2551, *quoting Calderon v. Thompson*, 523 U.S. 538, 550 (1998). The Court went on to caution that assuming *arguendo* that the lower appellate courts have the authority to withhold the mandate, it will hold the courts to a standard of “extraordinary circumstances that could **constitute a miscarriage of justice.**” *Id.* (emphasis added). A miscarriage of justice standard requires a habeas petitioner to establish actual innocence of the offense. *See House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995). Schad’s claim did not present a case of actual innocence.

Nowhere in its opinion does the Court pass on the substance of Schad’s *Martinez* argument. Nothing in the opinion can fairly be read to apply to the equitable motion under rule 60(b) presented here.

The subsequent history in the case of *Thompson v. Bell*, 545 U.S. 794 (2005) illustrates the point. Thompson’s case also presented a situation where a court of appeals revisited its opinion after the Supreme Court denied certiorari but before issuing its mandate. There the Supreme Court held the Court of Appeals had abused its discretion in not issuing the mandate. In *Thompson*, the Supreme Court noted that the evidence which caused the Court of Appeals to revisit its opinion was “not of such a character to warrant the Court of Appeals’ extraordinary departure from standard appellate practice.” *Id.* at 808-809. The Court goes on at some length to discuss just how the evidence would not

have likely led to relief, going so far as to observe, “Thompson still would have faced an uphill battle to obtaining federal habeas relief.” *Id.*

Importantly, for this Court’s purposes, the Supreme Court went on to describe the fact that Thompson had ongoing proceedings in the federal district court and that “the District Court will have an opportunity to address these matters again and in light of the current evidence.” *Id.* at 813. Thompson’s ongoing proceedings were under a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). *Thompson v. Bell*, No. 4:98-cv-00006, Docket Entry No. 149 (E.D. Tenn. June 4, 2004). Thus, the Court clearly understood that its opinion was relevant only to the procedural question.

So it is here.

II. SCHAD’S CLAIM IS PROCEDURALLY DEFAULTED; MARTINEZ APPLIES

A. LAW OF EXHAUSTION

Exhaustion requires that a petitioner fairly present his claim to the state court. *Weaver v. Thompson*, 197 F.3d 359, 365 (9th Cir. 1999). Fair presentation requires the petitioner to present both the operative facts that support his claim as well as his federal legal theory that his claim is based on so that the state court has a fair opportunity to apply the controlling law to the facts which bear upon the constitutional claim. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). “[F]or purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). It is hornbook law that new

facts which fundamentally alter a claim render that claim unexhausted and thus procedurally defaulted. *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994).

Contrary to Respondents assertion, Response at pp. 9-10, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) did not overrule *Vasquez v. Hillery*, 474 U.S. 254 (1986). In *Pinholster* the Court observed, “No party disputes that Pinholster's federal petition alleges an ineffective-assistance-of-counsel claim that had been included in both of Pinholster's state habeas petitions.” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1402 (2011). *Hillery* is not mentioned, let alone cited to or overruled, in *Pinholster*. Respondent does not cite a single case where any court has held that *Vasquez* has been overruled. Petitioner’s research has found district court opinions which hold the opposite. *Wheeler v. Cox*, 3:12-cv-00469-MMD-WGC, dkt. no. 27 (D. Nev. May 29, 2013); *Lewis v. Nevada*, 2:10-cv-01225-PMP-CWH, dkt. no. 53, at 2–3 (D.Nev., Feb. 4, 2013); *Aytch v. Legrand*, 3:10-cv-00767-RCJWGC, dkt. no. 33, at 2 n. 2 (D.Nev. March 29, 2013); *Moor v. Palmer*, No. 3:10-cv-00401-RCJ-WGC, dkt. no. 27, at 9–10 (D .Nev., July 17, 2012).

B. CLAIM P OF THE PETITION IS A NEW, PROCEDURALLY DEFAULTED CLAIM

AEDPA did not disturb the well-established principles of exhaustion. In *Moorman v. Schriro*, 426 F.3d 1044 (9th Cir. 2005), the Ninth Circuit observed that a petitioner who raises a claim of ineffective assistance of counsel based on specific instances of alleged

ineffectiveness cannot add new instances of misconduct to the claim without rendering the previously exhausted claim unexhausted.

Moormann contends that the facts of these claims were present in the state record and that they are fundamentally the same as the claims he did present in state court -- that his "counsel was ineffective for failing to investigate and present a viable defense." He does not contend that these more specific claims were presented in any state proceeding, and indeed they were not. ...

Moormann points out that we have held that, so long as the petitioner presented the factual and legal basis for his claims to the state courts, review in habeas proceedings is not barred. *E.g.*, *Chacon v. Wood*, 36 F.3d 1459, 1467-68 (9th Cir. 1994). **This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim.** See *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc).

Moormann v. Schriro, 426 F.3d 1044, 1056 (9th Cir. Ariz. 2005).

Respondent admits that his previous position in this litigation was that the evidence presented by Schad fundamentally altered the claim in such a way that it was an unexhausted, defaulted, new claim. Response, p. 10. Respondent now regrets that decision, but points to no change in the law that allows this Court to ignore the previous concession.³

This Court's previous merits holding on Petitioner's claim of ineffective assistance of sentencing counsel was limited to the claim that was presented and adjudicated on the

³ Respondent told the Court that Schad's new evidence placed his claim in a different evidentiary posture, "violating the exhaustion requirement." R. 116, p. 4 (Respondent's Opposition To Motion To Expand Record).

merits in the state court. It is that holding, alone, that was upheld by the Ninth Circuit after remand from the Supreme Court given the holding in *Pinholster*. This court's alternative dicta regarding the Petitioner's new claim of ineffectiveness for failure to investigate, present and properly prepare competent expert testimony and mitigation was reversed by the panel majority. The panel majority deleted that analysis from its amended opinion. It did not change its mind. The only thing the panel majority passed on was the old claim that was fairly presented to the state court. The panel majority could not have reached the new claim at the time of the appeal because the new claim was procedurally defaulted and ineffective assistance of post-conviction counsel was not available as an argument for cause. Nearly one month after rehearing was denied in an order forbidding the filing of any further rehearing petitions the Supreme Court decided *Martinez v. Ryan*. Thus, Schad's new claim was not available for federal court merits review until *Martinez*.

C. SCHAD'S NEW CLAIM IS IN A SIMILAR POSTURE TO THE NEW CLAIM IN *DICKENS*

Respondent ignores the import of the pending Ninth Circuit proceedings in *Dickens v. Ryan*, No. 08-99017. Respondent correctly notes the panel opinion is no longer precedent, but the panel opinion is instructive. The pending en banc decision in *Dickens* is directly relevant to Schad's case.

First, it is Respondent who urged the *en banc* court to review the *Dickens* case precisely because the panel decision in *Dickens* conflicted with the panel decision in *Schad*. *Id.*, Docket Entry No. 69-1, p. 1 (Rule 35 Statement Of Reasons For Granting

Rehearing). It is entirely possible that the Ninth Circuit en banc is poised to overrule the panel opinion in *Schad* in light of *Martinez*. This fact, in and of itself, is an extraordinary circumstance warranting 60(b) relief, or at a minimum a stay of execution pending the outcome of *Dickens*.

Second, the panel's treatment of Dickens new claim is instructive for this Court. The panel in *Dickens* followed a well-established test and found that the claim Dickens presented in federal court was different from the claim he presented in state court. The same is true for *Schad*.

Respondent misleads the court by alleging that *Schad*'s claim is on all fours with the claim at issue in *Pinholster*.⁴ It is not. The claim at issue in *Pinholster* was presented to the state court and fully supported by evidence presented at a lengthy evidentiary hearing. No party in *Pinholster* complained about the fairness of the state court process. *Pinholster* simply sought to present additional expert testimony in federal court on the same point that expert testimony had been offered in state court. *Schad*'s case is different.

Schad's state court claim was narrow and unsupported by evidence. *Schad*'s claim was limited to an allegation that "the presentence report was inadequate resulting in

⁴ Respondent advances a confusing and difficult to follow argument that *Pinholster* must apply here because a failure to apply *Pinholster* to a new, procedurally defaulted claim would encourage sandbagging. While respondent does not really explain how this argument is responsive to the claim that Petitioner's claim is new, it also fails to acknowledge that the Ninth Circuit, *en banc*, has rejected any concerns regarding sandbagging and *Martinez* arguments. "The concern that gave rise to the strict "cause" and "prejudice" rule is not at issue in a *Martinez* motion. There is no concern about competent counsel who might 'sandbag' at trial. The premise of *Martinez* is incompetent counsel. Indeed, the premise is two incompetent counsel-trial counsel and state PCR counsel. This quite different circumstance is reflected in the Court's more lenient rule in *Martinez* for excusing procedural default." *Detrich v. Ryan*, 2013 WL 4712729 *5 (9th Cir. 2013).

the Court not having available significant mitigating evidence prior to imposing the death penalty.” *Schad v. Arizona*, No. CR 8752, Supplemental Statement of Grounds for Relief, p. 7, see also *id.* pp. 9, 11. The post-conviction court described the claim as “defendant contends that counsel was ineffective for failing to uncover mitigating evidence that might exist.” *Schad v. Arizona*, No. CR 8752, June 21, 1996 Minute Entry, p. 2. The post-conviction court’s description was not surprising given PCR counsel’s utter failure to conduct the thorough investigation of Schad’s family background and history that she was obligated to conduct. The PCR counsel did not request appointment of a mental health expert or ever allege that Mr. Schad suffered from any sort of mental illness. PCR counsel did not offer social history records, data, or interviews. The PCR court did not conduct an evidentiary hearing.

Clearly, the claim presented in state court was a far different claim than that presented to this Court on initial habeas submission. Indeed the two separate and distinct claims bear little resemblance to one another. It is Petitioner’s new claim, and all of the evidence which supports it, including the expert testimony of Drs. Sanislaw and Leibowitz, and the exhibits that corroborate their findings⁵ that Petitioner claims is procedurally defaulted and thus subject to federal habeas review because he can establish cause under *Martinez*.⁶ The en banc opinion in *Detrich* holds that *Martinez* allows:

⁵ Docket Entries 100, 115. The new evidence is in multiple volumes, 700 pages in length.

⁶ Because the law at the time was unclear as to whether Schad was required to exhaust his *Martinez* cause argument, he brought his argument as a claim for relief in successive Rule 32. The PCR court, who was not the sentencing court, denied the claim on grounds that *Martinez* is a equitable procedural defense in federal court and not a separate state court claim. There are a

new claims of trial-counsel IAC, asserted for the first time on federal habeas, even if state PCR counsel properly raised other claims of trial-counsel IAC. The Court implicitly confirmed this reading in *Trevino*, where it held that Martinez applied to Trevino's procedurally defaulted trial-counsel IAC claims even though Trevino's state PCR counsel had presented other trial-counsel IAC claims during the initial-review collateral proceeding.

Detrich, at *9.

The argument advanced by Respondent that *Pinholster* should control this Motion under Rule 60(b) was rejected by the en banc court in *Detrich*:

However, *Pinholster* does not prevent a district court from holding an evidentiary hearing in a *Martinez* case. *Pinholster* applies when a “claim” has been “ ‘adjudicated on the merits in State court proceedings.’ ” *Id.* at 1398 (quoting 28 U.S.C. § 2254(d)). But *Pinholster*'s predicates are absent in the context of a procedurally defaulted claim in a *Martinez* case in which a habeas petitioner seeks to excuse his default. First, “cause” to excuse a procedural default under *Martinez* is not a “claim.” A finding of IAC by the PCR counsel under *Martinez* is only an “equitable” ruling that there is “cause” excusing the state-court procedural default. *Martinez*, 132 S.Ct. at 1319–20. Second, in a *Martinez* case, neither the underlying IAC claim nor the question of PCR-counsel ineffectiveness has been adjudicated on the merits in a state-court proceeding.

Martinez would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him. *See Strickland*, 466 U.S. at 694 (noting the unfairness of applying the restrictive “newly discovered evidence standard” where ineffective assistance of counsel was the reason the evidence was not discovered earlier). The same is true of the factual record of his trial-counsel's

number of other problems, errors, and inaccuracies in the PCR court's order, but those need not be addressed since Respondent told the Ninth Circuit that the Rule 32 order had no impact on Schad's argument that he was entitled to relief under *Martinez*. *Schad v. Ryan*, 2013 U.S. App. LEXIS 5595 *8, n.1 (9th Cir. Feb. 26, 2013)(Respondent advised the Court that state court decision on successor Rule 32 "has no effect on this Court's [the Ninth Circuit's] review of this claim" because it decided the Martinez issue only under Arizona state law and it was not bound to follow *Martinez*. Respondents-Appellees' Supp. Br. at 18, Dkt. 103.”)

ineffectiveness. In deciding whether to excuse the state-court procedural default, the district court thus should, in appropriate circumstances, allow the development of evidence relevant to answering the linked Martinez questions of whether there was deficient performance by PCR counsel and whether the underlying trial-counsel IAC claims are substantial.

Id., at *7-8.

Finally, Petitioner acknowledges that the Ninth Circuit’s February 26, 2013 order has been vacated, but the Supreme Court did not address the question presented here in a motion pursuant to Rule 60(b). This Court has the benefit of knowing that the panel majority agrees that the claim Schad presented in federal habeas so fundamentally altered the claim presented to the state court that the claim is a new, procedurally defaulted claim. The Supreme Court did not reverse or criticize that holding. Respondent invites error when it urges this Court to simply forget what it already knows.

III. SCHAD’S CLAIM IS SUBSTANTIAL; TEST IS “DEBATABLE AMONG JURISTS OF REASON”

While Respondent acknowledges that the test for determining whether a petitioner may proceed under Martinez is substantiality, he fails to define, analyze, or apply the test. They also mislead the Court as to the proper analytical framework. Though the Ninth Circuit’s en banc decision *Detrich v. Ryan* was announced prior to Respondent’s filing, and Respondent cites *Detrich* for another reason, he completely ignores the holding of *Detrich* and its impact on this Court’s analysis.

A. THE THRESHOLD TEST FOR SUBSTANTIALITY IS EXTREMELY LENIENT

The Detrich opinion announced the framework in which *Martinez* arguments are to be addressed in the Ninth Circuit. A prisoner must show four things: First, that his underlying claim is substantial. Second, that there is a substantial claim of ineffective assistance of post-conviction counsel. Third, that the state collateral review proceeding was the first opportunity to raise the IAC claim. Fourth, state law requires IAC claims to be raised in collateral review. Schad, like Detrich, is a death row inmate in Arizona. Just like Detrich, the court need not “pause” over the third and fourth prongs of the test as they are clearly established for Arizona inmates. *Detrich*, at *5.

To establish that a Petitioner presents a substantial claim, he must show that his claim “has some merit.” *Martinez*, 132 S.Ct. at 1318-19. To establish that a claim has some merit, the petitioner must show that the claim is debatable amongst jurists of reason. *Detrich*, at *6 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

B. SCHAD’S NEW CLAIM IS CLEARLY DEBATABLE AMONG JURISTS OF REASON; THE NINTH CIRCUIT’S TWO PRIOR OPINIONS CONCLUSIVELY ESTABLISH THIS PRONG. RES IPSA LOQUITUR.

Here, we know for a fact that the merits of Petitioner’s new claim of ineffective assistance of sentencing counsel for failure to investigate, present, and prepare mitigating mental health evidence, and the corroboration that supported that mental health evidence, is debatable amongst jurists of reason. We know this because the panel majority found that the underlying claim, if proven, is “more than substantial.... Schad’s counsel’s

failure to investigate and present evidence of his serious mental illness ‘had a substantial and injurious effect or influence in determining the [sentence.]’” *Schad v Ryan*, 2013 WL 791610, *6 (9th Cir. 2013), quoting, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Thus, Respondent’s reliance on this court’s previous dicta is erroneous. The panel majority wrote:

Perhaps most important, Schad's new mitigating evidence, which was never presented to the state court ...likely would have affected the outcome. The evidence Schad would have presented in mitigation, had it not been for sentencing counsel's and post-conviction counsel's errors, would have demonstrated that Schad was suffering from “several major mental disorders” at the time of the crime, specifically extremely serious mental conditions such as bipolar disorder, schizoaffective disorder, and dissociative disorders, among others. ER 540. As we have stated previously, these facts provided

[t]he missing link [to] what in [Schad's] past could have prompted him to commit this aberrant violent act of intentionally killing Grove. Without this psychological link, the crime appeared to be nothing but the act of a ruthless and cold blooded killer in the course of a robbery, and Schad was therefore sentenced to death.

With the missing evidence before it, however, the sentencer could well have concluded that due to his serious mental illnesses, Schad did not bear the same level of responsibility for the crime as would someone with normal mental functioning.

Id. at * 4, quoting, *Schad v. Ryan*, 581 F.3d 1019, 1034 (9th Cir.2009) (subsequent history omitted).

The Supreme Court did not comment on this aspect of the Ninth Circuit’s opinion. Thus, though it is not precedent, this Court can acknowledge and consider the thinking of the appellate judges on the Ninth Circuit who have also reviewed the facts of this case.

C. SCHAD HAS PLED A SUFFICIENT CLAIM OF CAUSE AND PREJUDICE UNDER *MARTINEZ*

The Ninth Circuit in *Detrich* wrote, “*Martinez* authorizes a finding of “cause” excusing procedural default of any substantial trial-counsel IAC claim that was not raised by an ineffective PCR counsel, even if some trial-counsel IAC claims were raised.” *Detrich*, at *9. The en banc court in *Detrich* was careful to acknowledge that once a Petitioner shows that he has 1) a substantial claim that was 2) not raised, further evidentiary development is necessary. In other words, at this juncture, the Court should order discovery and an evidentiary hearing.

Schad has shown that he has a substantial claim that was not raised by his PCR counsel. But Schad has shown even more through an analysis of the previous proceedings in this case where Respondent has serially and repeatedly argued that PCR counsel was not diligent. Respondent used this argument with great effect and secured important litigation advantages. Respondent’s efforts to walk back those comments now are unavailing. Here again, Respondent fail to cite, acknowledge, analyze or argue how Schad has not met the standard under *Martinez/Trevino* as announced in *Detrich*.

And once again, we know from the panel majority, that Schad has established cause and prejudice under *Martinez/Trevino*.

IV. 60(B) RELIEF IS WARRANTED

Respondent’s remaining potpourri of arguments is similarly unavailing. First, Respondent ignores the cases cited by Petitioner in his motion. The Supreme Court’s

orders vacating the decisions of the Fifth Circuit in two Texas cases establish the availability of Rule 60(b) as an appropriate and available procedural vehicle for the presentation of Martinez arguments. See *Balentine v. Thaler*, 133 S.Ct. 2763 (2013)(mem.); *Haynes v. Thaler*, 133 S.Ct. 2764 (2013)(mem.). Second, Respondent ignores the Phelps factors. Third, Respondent repeats his law of the case argument. But we have already established that the Supreme Court's opinion was narrow and limited to whether Schad had shown actual innocence in order to justify a deviation from the mandate procedures. There has been no adjudication of the applicability of *Martinez* to Schad's procedurally defaulted claim of IAC of sentencing counsel. Fourth, Respondent castigates Schad for seeking to invoke *Martinez* relief earlier. But this argument makes no sense as it simply reinforces Schad's diligence in litigating his new claim. Fifth, Respondent repeats his conclusory statement that Schad has not shown that his claim is substantial. We have conclusively shown that indeed it is. Finally, Respondent repeats his claim that the Ninth Circuit has summarily denied the merits of Schad's *Martinez* argument. But as we explained above, the Circuit's order denying an unauthorized second petition for rehearing after expressly stating that it would not entertain any further petition's for rehearing cannot be fairly read as a ruling on the merits of the claim-only that the Court would not entertain the presentation of that claim in that procedural posture.

V. CONCLUSION

This case has followed a tortured procedural path: Edward Schad has never received a hearing, in any court, on the merits of his substantial and meritorious claim that his trial counsel was ineffective in failing to investigate, present, and prepare competent mental health evidence that would have shown that although he is a good man, he is also a man with mental illness. Mentally ill persons are not inherently bad people as Respondent suggests. But rather, they are individuals with mental illness, and as such, are victims of a disease that is beyond their control. Evidence of Schad's mental illness would have provided crucial mitigating evidence to the sentencer. His trial and PCR counsel failed him when they failed to discover and present this key, existing and accessible evidence. The law in this area has changed dramatically and for the first time, Schad's claim is available for federal habeas review. This Court should grant the motion and any other relief it deems just and necessary.

Respectfully submitted this 13th of September, 2013.

/s/ Kelley J. Henry
Kelley J. Henry
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Copy of the foregoing served this
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Attorney for Edward Schad

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Edward Harold Schad,

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Petitioner,

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v.

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Charles L. Ryan, et al.,

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Respondents.

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) No. CV-97-02577-PHX-ROS

) DEATH PENALTY CASE

) **ORDER DISMISSING MOTION FOR
RELIEF FROM JUDGMENT**

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Before the Court is Petitioner’s motion for relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Doc. 145.) The motion is based on the Supreme Court’s decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that ineffective assistance of post-conviction counsel may serve as cause to excuse the procedural default of a claim alleging ineffective assistance of trial counsel. Petitioner argues that *Martinez* provides a proper ground for this Court to reopen these proceedings to consider anew the merits of his claim alleging ineffective assistance of counsel at sentencing (“Claim P’). Respondents oppose the motion. (Doc. 147.) The Court concludes that, because Petitioner’s Rule 60(b) motion is a challenge to the Court’s resolution of Claim P on the merits, it constitutes a second or successive petition that may not be considered by this Court absent authorization from the Court of Appeals for the Ninth Circuit.

BACKGROUND

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2 In 1979, a jury convicted Petitioner of first-degree murder for the 1978 strangling of
3 74-year-old Lorimer Grove, and the trial court sentenced him to death. Details of the crime
4 are set forth in the Arizona Supreme Court’s first opinion upholding Petitioner’s conviction
5 and sentence. *See State v. Schad*, 129 Ariz. 557, 561–62, 633 P.2d 366, 370–71 (1981).
6 Pursuant to Rule 32 of the Arizona Rules of Criminal Procedure, Petitioner filed a petition
7 for post-conviction relief, which the trial court denied. Upon petition for review, however,
8 the Arizona Supreme Court reversed the conviction due to an error in jury instructions and
9 remanded for a new trial. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984).

10 In 1985, a jury again convicted Petitioner, and the trial court again sentenced him to
11 death. On direct appeal, the Arizona Supreme Court affirmed. *State v. Schad*, 163 Ariz. 411,
12 423, 788 P.2d 1162, 1174 (1989). The United States Supreme Court granted certiorari but
13 ultimately affirmed.¹ *Schad v. Arizona*, 501 U.S. 624 (1991).

14 Petitioner sought post-conviction relief in the state trial court, which found many of
15 the claims procedurally precluded. The court denied post-conviction relief after reviewing
16 the merits of the remaining claims. The Arizona Supreme Court summarily denied a petition
17 for discretionary review.

18 Petitioner initiated these federal habeas proceedings in 1997 and filed an amended
19 petition for habeas corpus relief in 1998. The petition alleged ineffective assistance of
20 counsel at sentencing due to counsel’s failure to (1) adequately investigate Petitioner’s
21 criminal background and develop available mitigating evidence; (2) locate records and
22 interview persons familiar with Petitioner’s background; (3) object to erroneous information
23 contained in the presentence report; and (4) present proportionality evidence at sentencing.

24
25 ¹ The Court granted certiorari to address two questions, both of which it
26 answered in the negative: “[W]hether a first-degree murder conviction under jury instructions
27 that did not require agreement on whether the defendant was guilty of premeditated murder
28 or felony murder is unconstitutional; and (2) whether the principle recognized in *Beck v.*
Alabama, 447 U.S. 625 (1980), entitles a defendant to instructions on all offenses that are
lesser than, and included within, a capital offense as charged.” *Schad*, 501 U.S. at 627.

1 (Doc. 27 at 84–85.) In their Answer, Respondents (who first labeled the sentencing
2 ineffectiveness allegations as “Claim P”) conceded that sub-parts (1)–(3) were properly
3 exhausted during the state post-conviction proceeding. (Doc. 29 at 25.) In May 2000, the
4 Court issued an order concerning the procedural status of Petitioner’s claims, finding many
5 to be procedurally barred or plainly meritless. (Doc. 59.) The Court ordered the parties to
6 brief the merits of the remaining claims, including sub-parts (1)–(3) of Claim P. (*Id.*)

7 Petitioner filed his merits brief in October 2000. Regarding Claim P, Petitioner
8 focused on counsel’s failure to investigate Petitioner’s miserable and abusive childhood,
9 arguing that counsel’s investigation was inadequate and that counsel failed to present
10 “persuasive, corroborating evidence, including records and witnesses, of the nature and
11 extent of [the abuse], as well as its longstanding effects on him.” (Doc. 82 at 81.) In support,
12 Petitioner proffered numerous materials not presented to the state court, including an
13 affidavit from his mother, an affidavit from an investigator recounting a conversation with
14 Petitioner’s sister, employment records of Petitioner’s mother, and Veterans’ Administration
15 records of Petitioner’s father and younger brother. (Doc. 84.) In opposition, Respondents
16 disputed that counsel’s performance was either deficient or prejudicial. (Doc. 91 at 63.)
17 Citing 28 U.S.C. § 2254(e)(2), Respondents further argued that Petitioner was precluded
18 from getting a federal evidentiary hearing due to his failure to exercise due diligence in state
19 court to develop the facts supporting Claim P. (*Id.* at 65.) In his reply, Petitioner appended
20 an affidavit from Leslie Lebowitz, Ph.D., which focused on the mental health of Petitioner’s
21 parents.

22 More than three years after the conclusion of merits briefing, Petitioner moved to
23 expand the record to include a 92-page affidavit from Charles Stanislaw, Ph.D. (Doc. 115.)
24 Dr. Stanislaw opined concerning the mental health of Petitioner’s parents and the effect of
25 their condition, and of other social and economic factors, on Petitioner’s psychological
26 development. The affidavit also chronicled Petitioner’s education, military service, and
27 criminal activities, and theorized about the cause of Petitioner’s erratic and self-defeating
28 behaviors. Dr. Stanislaw concluded that Petitioner “exhibited many symptoms indicative of

1 a severe and chronic illness. His history of abuse, neglect, and abandonment cannot be ruled
2 out as playing a significant factor in [his] psychiatric and behavioral functioning as an adult.”
3 (*Id.* at 90.)

4 Respondents filed an opposition to the expansion request, again arguing that
5 Petitioner’s lack of diligence and failure to meet the narrow exceptions of § 2254(e)(2)
6 precluded a federal evidentiary hearing. (Doc. 116.) Respondents also argued *inter alia* that
7 expansion of the record was unnecessary because the Court’s determination of whether the
8 state court had reasonably applied *Strickland* in denying Claim P was limited to consideration
9 of the record that was before the state court when it ruled.

10 In September 2006, the Court entered an order and memorandum of decision denying
11 habeas relief. (Doc. 121.) With regard to Claim P, the Court concluded that Petitioner had
12 failed to show that the state court’s denial of the claim was based on an unreasonable
13 application of *Strickland*. (*Id.* at 61–67.) The Court further found, with respect to
14 Petitioner’s attempt to introduce factual information that was not before the state court when
15 it ruled, that Petitioner lacked diligence in developing these facts and therefore was not
16 entitled to an evidentiary hearing or expansion of the record. (*Id.* at 84–86.) Nonetheless,
17 the Court determined that, even considering the new materials, Claim P lacked merit. (*Id.*
18 at 64–67.)

19 On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded for an
20 evidentiary hearing to determine whether Petitioner had diligently sought to develop the
21 factual record in state court. *Schad v. Ryan*, 606 F.3d 1022 (9th Cir. 2010). On petition for
22 certiorari from Respondents, the Supreme Court vacated the Ninth Circuit’s opinion and
23 remanded for further proceedings in light of *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398–99
24 (2011), in which the Court held that federal habeas review under 28 U.S.C. § 2254(d)(1) “is
25 limited to the record that was before the state court that adjudicated the claim on the merits.”
26 *Ryan v. Schad*, 131 S. Ct. 2092 (2011). On remand, the Ninth Circuit affirmed this Court’s
27 denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708 (9th Cir. 2011) (per curiam). The Ninth
28 Circuit subsequently denied a motion for rehearing and rehearing en banc in February 2012.

1 On July 10, 2012, Petitioner moved the Ninth Circuit to vacate its judgment and
2 remand to this Court for additional proceedings in light of *Martinez*, which had been decided
3 in March 2012. On July 27, 2012, the Ninth Circuit denied the motion, and Petitioner filed
4 a petition for writ of certiorari. The Supreme Court denied the petition on October 9, 2012,
5 and denied a petition for rehearing on January 7, 2013.

6 On the same date as the denial of rehearing, Petitioner filed an emergency motion at
7 the Ninth Circuit requesting a continued stay of the mandate in light of an order granting en
8 banc review issued just three days earlier in another capital case from Arizona. Petitioner
9 argued that the en banc case would be addressing the interaction between *Pinholster* and
10 *Martinez*. The Ninth Circuit denied the motion on February 1, 2013. However, instead of
11 issuing the mandate affirming this Court's denial of habeas relief, the appellate court *sua*
12 *sponte* construed the emergency stay motion as a motion for reconsideration of the denial of
13 Petitioner's July 2012 motion to vacate judgment in light of *Martinez*. The Ninth Circuit
14 subsequently granted reconsideration, remanded to this Court for application of *Martinez* to
15 Petitioner's sentencing ineffectiveness claim, and stayed an execution warrant for March 6,
16 2013, which the Arizona Supreme Court had issued following the denial of certiorari. *Schad*
17 *v. Ryan*, No. 07-99005, 2013 WL 791610 (9th Cir. Feb. 26, 2013.)

18 On March 4, 2013, the Ninth Circuit denied Respondents' petition for rehearing and
19 rehearing en banc, with eight judges dissenting. *Schad v. Ryan*, 709 F.3d 855 (9th Cir.
20 2013). On that same date, Respondents moved in the Supreme Court for an order vacating
21 the stay of execution and filed a petition for certiorari. The Court declined to vacate the stay
22 of execution but on June 24, 2013, granted certiorari and reversed the Ninth Circuit with
23 instructions to issue its mandate affirming the denial of habeas relief. *Ryan v. Schad*, 133 S.
24 Ct. 2548 (2013) (per curiam). The Court concluded that the Ninth Circuit abused its
25 discretion in choosing not to issue the mandate based on an argument it had considered and
26 rejected in the July 2012 initial motion to vacate judgment. In doing so, the Court found "no
27 indication that there were any extraordinary circumstances here that called for the [Ninth
28 Circuit] to revisit an argument *sua sponte* that it had already explicitly rejected." *Id.* at 2552.

1 On June 25, 2013, Respondents moved the Arizona Supreme Court to issue a new
2 warrant of execution. On July 19, 2013, Petitioner filed a petition for rehearing with the
3 United States Supreme Court, which was denied five weeks later. *Ryan v. Schad*, No. 12-
4 1084, 2013 WL 4606329 (U.S. Aug. 30, 2013). Three days prior to that ruling, Petitioner
5 filed the instant motion to vacate judgment based on *Martinez*, and this Court set a briefing
6 schedule. (Docs. 144, 145.) On September 3 and 4 respectively, the Arizona Supreme Court
7 set Petitioner’s execution for October 9, 2013, and the Ninth Circuit issued its mandate
8 affirming this Court’s denial of habeas relief. Respondents filed an opposition to the instant
9 motion to vacate judgment on September 6, and Petitioner filed a reply on September 13.
10 (Docs. 147, 150.)

11 DISCUSSION

12 Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from
13 judgment on several grounds, including the catch-all category “any other reason justifying
14 relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(6). A motion under
15 subsection (b)(6) must be brought “within a reasonable time,” Fed. R. Civ. P. 60(c)(1), and
16 requires a showing of “extraordinary circumstances.” *Gonzalez v. Crosby*, 545 U.S. 524, 535
17 (2005).

18 For habeas petitioners, a Rule 60(b) motion may not be used to avoid the requirements
19 for second or successive petitions set forth in 28 U.S.C. § 2244(b). *Gonzalez*, 545 U.S. at
20 530–31. This statute has three relevant provisions: First, § 2244(b)(1) requires dismissal of
21 any claim that has already been adjudicated in a previous habeas petition. Second,
22 § 2244(b)(2) requires dismissal of any claim not previously adjudicated unless the claim
23 relies on either a new and retroactive rule of constitutional law or on new facts demonstrating
24 actual innocence of the underlying offense. Third, § 2244(b)(3) requires prior authorization
25 from the court of appeals before a district court may entertain a second or successive petition
26 under § 2244(b)(2). Absent such authorization, a district court lacks jurisdiction to consider
27 the merits of a second or successive petition. *United States v. Washington*, 653 F.3d 1057,
28 1065 (9th Cir. 2011); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

1 In *Gonzalez*, the Court held that a Rule 60(b) motion constitutes a second or
2 successive habeas petition when it advances a new ground for relief or “attacks the federal
3 court’s previous resolution of a claim *on the merits*.” 545 U.S. at 532. “On the merits” refers
4 “to a determination that there exist or do not exist grounds entitling a petitioner to habeas
5 corpus relief under 28 U.S.C. §§ 2254(a) and (d).” *Id.* at 532 n.4. The Court further
6 explained that a legitimate Rule 60(b) motion “attacks, not the substance of the federal
7 court’s resolution of a claim on the merits, but some defect in the integrity of the federal
8 habeas proceedings.” *Id.* at 532; *accord United States v. Buenrostro*, 638 F.3d 720, 722 (9th
9 Cir. 2011) (observing that a defect in the integrity of a habeas proceeding requires a showing
10 that something happened during that proceeding “that rendered its outcome suspect”). For
11 example, a Rule 60(b) motion does *not* constitute a second or successive petition when the
12 petitioner “merely asserts that a previous ruling which precluded a merits determination was
13 in error—for example, a denial for such reasons as failure to exhaust, procedural default, or
14 statute-of-limitations bar”—or contends that the habeas proceeding was flawed due to fraud
15 on the court. *Id.* at 532 nn.4–5; *see, e.g., Butz v. Mendoza-Powers*, 474 F.3d 1193 (9th Cir.
16 2007) (finding a Rule 60(b) motion not to be the equivalent of a second or successive petition
17 where district court dismissed first petition for failure to pay filing fee or comply with court
18 orders and did not reach merits of claims). The Court reasoned that if “neither the motion
19 itself nor the federal judgment from which it seeks relief substantively addresses federal
20 grounds for setting aside the movant’s state conviction,” there is no basis for treating it like
21 a habeas application. *Gonzalez*, 545 U.S. at 533.

22 On the other hand, if a Rule 60(b) motion “presents a ‘claim,’ i.e., ‘an asserted federal
23 basis for relief from a . . . judgment of conviction,’ then it is, in substance, a new request for
24 relief on the merits and should be treated as a disguised” habeas application. *Washington*,
25 653 F.3d at 1063 (quoting *Gonzalez*, 545 U.S. at 530). Interpreting *Gonzalez*, the court in
26 *Washington* identified numerous examples of such “claims,” including:

27 a motion asserting that owing to “excusable neglect,” the movant’s habeas
28 petition had omitted a claim of constitutional error; a motion to present “newly
discovered evidence” in support of a claim previously denied; a contention that

1 a subsequent change in substantive law is a reason justifying relief from the
2 previous denial of a claim; a motion that seeks to add a new ground for relief;
3 a motion that attacks the federal court’s previous resolution of a claim on the
4 merits; a motion that otherwise challenges the federal court’s determination
that there exist or do not exist grounds entitling a petitioner to habeas corpus
relief; and finally, an attack based on the movant’s own conduct, or his habeas
counsel’s omissions.”

5 *Id.* (internal quotations and citations omitted). If a Rule 60(b) motion includes such claims,
6 it is not a challenge “to the integrity of the proceedings, but in effect asks for a second chance
7 to have the merits determined favorably.” *Gonzalez*, 545 U.S. at 532 n.5.

8 In their briefs, the parties debate extensively the “law of the case” doctrine as it relates
9 to Petitioner’s *Martinez* argument and the existence of extraordinary circumstances to justify
10 relief under Rule 60(b). However, because the requirements for second or successive
11 petitions apply to motions filed under Rule 60(b), the Court is required under *Gonzalez* to
12 first determine whether Petitioner’s motion is a legitimate Rule 60(b) motion or is a
13 “disguised” second or successive habeas petition; that is, whether the motion goes to the
14 integrity of the habeas proceedings or is a new request for relief on the merits. If the motion
15 is the equivalent of a second or successive petition, the Court lacks jurisdiction to consider
16 it. *Washington*, 653 F.3d at 1065; *Cooper*, 274 F.3d at 1274. If the motion does not
17 constitute a second or successive petition, the Court must consider whether extraordinary
18 circumstances exist to grant relief from judgment. *See, e.g., Phelps v. Alameida*, 569 F.3d
19 1120, 1128 (9th Cir. 2009) (considering existence of extraordinary circumstances after
20 observing that Rule 60(b) motion challenging dismissal of petition on statute-of-limitations
21 grounds not the equivalent of a successive habeas petition).

22 Petitioner’s motion does not identify a specific “defect” in the integrity of his habeas
23 proceeding or point to “something that happened during that proceeding that rendered its
24 outcome suspect.” *Buenrostro*, 638 F.3d at 722. Rather, throughout his motion, Petitioner
25 repeatedly states that Claim P, alleging ineffective assistance of counsel at sentencing, is a
26 “new, unexhausted, procedurally defaulted claim” to which *Martinez* now provides cause to
27 excuse the procedural default. (Doc. 145 at 5.) Although he does not expressly contend that
28 this Court found Claim P procedurally defaulted, Petitioner nonetheless suggests that his

1 Rule 60(b) motion is legitimate because it challenges a procedural issue, not a substantive
2 ruling on the merits. (*Id.* at 29.) The record refutes this premise.

3 In their Answer, Respondents conceded that the relevant sub-parts of Claim P at issue
4 here were properly exhausted in state court and did not assert procedural default as a defense.
5 *See Trest v. Cain*, 522 U.S. 87, 89 (1997) (noting that procedural default is a defense that
6 must be raised and preserved); *see also Wood v. Milyard*, 132 S. Ct. 1826, 1833–34 (2012)
7 (observing that it would be “an abuse of discretion” for a court to override a State’s
8 deliberate waiver of a procedural defense). Consequently, the Court ordered supplemental
9 merits briefing on the claim and subsequently reviewed the claim on the merits.² At no point
10 did the Court consider whether Claim P was procedurally defaulted or whether Petitioner
11 could establish cause and prejudice to overcome such a default. *Contra Cook v. Ryan*, 688
12 F.3d 598, 608 (9th Cir.), *cert denied*, 133 S. Ct. 81 (2012) (finding no “second or successive
13 petition” bar to consideration of Rule 60(b) motion premised on *Martinez* where underlying
14 trial ineffectiveness claim was found procedurally barred by district court). Although the
15 Court determined that Petitioner’s lack of diligence precluded expansion of the record and
16 an evidentiary hearing to develop new facts in support of Claim P, this was not a procedural
17 determination that “precluded a merits determination.” *Gonzalez*, 545 U.S. at 532 n.4.

18 _____
19 ² In their opposition to Petitioner’s motion to expand the record to include the
20 declaration of Dr. Sanislow, Respondents argued that Petitioner had failed to exercise
21 diligence in developing the factual basis of Claim P in state court. (Doc. 116 at 4–9.) In the
22 concluding paragraph of this argument, Respondents also asserted that expanding the record
23 to include the new declaration “would place the claim in a significantly different evidentiary
24 posture than it was in before the state court, thereby violating the fair presentation
25 requirement.” (*Id.* at 9.) In reply, and contrary to his arguments in the instant motion,
26 Petitioner argued that the factual predicate of Claim P had been fairly presented in state court
27 and that Dr. Sanislow’s declaration did not “fundamentally alter” the claim, but only
28 supplemented it. (Doc. 119 at 5–6.) Petitioner also pointed out that Respondents elsewhere
in their opposition described Sanislow’s declaration as “cumulative” to what had been
presented in state court. (*Id.* at 6; *see* Doc. 116 at 10.) The Court ultimately denied the
motion without prejudice, noting that it would consider whether Petitioner diligently
attempted to develop the factual basis of Claim P when it considered the claim on the merits.
(Doc. 120.)

1 Rather, this finding under § 2254(e)(2) merely informed the scope of the record to be
2 reviewed in considering the state court’s adjudication of the claim’s merits under § 2254(d).
3 *But see Lopez v. Ryan*, 678 F.3d 1131, 1137 (9th Cir.), *cert. denied*, 133 S. Ct. 55 (2012)
4 (noting, for claims adjudicated in state court, tension between *Pinholster* limiting § 2254(d)
5 review to record before state court and suggested expansion of *Martinez* to excuse post-
6 conviction counsel’s failure under § 2254(e)(2) to fully develop factual basis of claim in state
7 court). Because this Court ultimately found that Claim P provided no basis for habeas relief
8 under § 2254(d), this was, in accord with *Gonzalez*, an “on the merits” ruling. Moreover, the
9 Court alternatively considered the same evidence now advanced by Petitioner in the instant
10 motion and nonetheless determined that Claim P lacked merit. (Doc. 121 at 64–66.)
11 Petitioner’s Rule 60(b) motion does not present a new claim; rather, he seeks “a second
12 chance to have the merits determined favorably.” *Gonzalez*, 545 U.S. at 532 n.5.

13 Petitioner rightly notes that the Ninth Circuit affirmed the denial of Claim P based
14 solely on the record that was before the state court, pursuant to the Supreme Court’s directive
15 in *Pinholster*, without considering the new evidence developed in these federal habeas
16 proceedings. From this, Petitioner suggests that this Court’s alternative consideration of the
17 new evidence is “dicta.” (Doc. 150 at 8.) Regardless, the Ninth Circuit’s ruling also was an
18 “on the merits” ruling. The Ninth Circuit affirmed this Court’s denial of relief under
19 § 2254(d) based on a finding that the state court’s adjudication of Claim P was not
20 objectively unreasonable. *Schad*, 671 F.3d at 721–22. This was plainly a merits
21 determination, not a procedural ruling precluding consideration of the merits.

22 The Court finds support for its conclusion in *United States v. Washington*. There, the
23 petitioner argued in a Rule 60(b) motion that the district judge mishandled his § 2255 habeas
24 application by, among other things, declining to conduct an evidentiary hearing. The Ninth
25 Circuit found that the petitioner had not alleged a defect in the integrity of the proceedings
26 but was, in essence, seeking reconsideration of the merits of his claims. 653 F.3d at 1064.
27 The same is true here. The instant Rule 60(b) motion does not allege any specific defect in
28 the integrity of the district court proceedings. Rather, it seeks to have this Court rescind its

1 original merits ruling on Claim P, *sua sponte* raise and find Claim P to be procedurally
2 defaulted, determine that post-conviction counsel’s ineffectiveness provides cause and
3 prejudice to excuse that default, and then (assuming cause and prejudice is shown) reconsider
4 the merits of Claim P *de novo*, without the deference required by § 2254(d). At its core, the
5 motion attacks both this Court’s and the Ninth Circuit’s “determination that there exist or do
6 not exist grounds entitling a petitioner to habeas corpus relief.” *Gonzalez*, 545 U.S. at 532
7 n.4. Thus, it raises a “claim” and must be treated as a second or successive petition pursuant
8 to *Gonzalez*.

9 **CONCLUSION**

10 Petitioner’s Rule 60(b) motion seeks to litigate a claim already adjudicated on the
11 merits by this Court. It is therefore a second or successive petition, and this Court lacks
12 jurisdiction to consider it absent authorization from the court of appeals pursuant to
13 § 2244(b)(3).

14 Accordingly,

15 **IT IS ORDERED** that Petitioner’s Motion for Relief from Judgment Pursuant to Rule
16 60(b)(6) (**Doc. 145**) is dismissed as an unauthorized second or successive petition.

17 DATED this 18th day of September, 2013.

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22 Roslyn O. Silver
23 Senior United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

*****DEATH PENALTY CASE***
EXECUTION SCHEDULED OCTOBER 9, 2013 10:00 A.M.**

EDWARD HAROLD SCHAD ,)	
)	
Petitioner,	)	CIV-97-2577-PHX-ROS
)	
vs.	)	NOTICE OF APPEAL
)	
CHARLES RYAN , et al.,)	
)	
Respondents.)	
)	

Comes Now, Edward Schad, by counsel and Notices his appeal of this Court's order dated September 19, 2013, Docket Entry No. 151.

Respectfully submitted,

/s/ Kelley J .Henry
Kelley J. Henry
Denise I. Young

Attorneys for Edward Schad

Copy of the foregoing served this
19th day of September, 2013, by CM/ECF to:

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