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

STATE OF ARIZONA Plaintiff, v. JAMES CORNELL HARROD, Defendant.	NO. CR1995-009046-001 **MOTION FOR RECONSIDERATION (CAPITAL CASE)** (Assigned to the Hon. David B. Gass)

The Defendant, James Harrod, by and through counsel undersigned hereby moves this court to reconsider its June 6, 2013 ruling that all but one sub-argument are precluded or meritless. The Court, under the rubric of "reframing" has precluded a number of claims. The Court neither defines or explains what constitutes "reframing", nor cites any authority authorizing such action.

Petitioner has not "reframed" any argument in his reply. Rule 32.2 does not require any argument specifically denominate which exception is relied upon to avoid preclusion. Rather, Rule 32.2(b) requires only that successive or untimely petitions "must 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." This importation of a requirement from a subsection in which it appears into one which it does not offends a principle of logic so fundamental that, *to this day*, it is still expressed in its original Latin:

> More devastating still for the Court's "identification" theory, the statute *does* enumerate two instances in which a DNA sample may be tested for the purpose of identification: "to help identify *human remains*," §2-505(a)(3) (emphasis added), and "to help identify *missing individuals*." §2-505(a)(4) (emphasis added). No mention of identifying arrestees. *Inclusio unius est exclusio alterius*. And note again that Maryland forbids using DNA records "for any purpose other than those specified"–it is actually a crime to do so. §2-505(b)(2).
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> *Maryland v. King*, 569 U.S. _____ 2013 (Scalia dissenting).

This is a first Petition of right, not a successor or untimely filed Petition.

PRECLUDED CLAIMS

1. Fingerprint

The fingerprint argument could be based on nothing other than newly discovered material facts as described in Rule 32.1(e). The court is imposing a condition upon Petitioner which the rules do not require of him in order to find that he has "reframed" his argument in the Reply. His argument remains unchanged and identical from Petition to Reply.

At the time of the 1995 trial, fingerprint evidence was accepted, albeit mistakenly, as 100% accurate and infallible. Events since 2006 conclusively demonstrate these claims are false. These events are the 2006 US Department of Justice's Review of the FBI's Handling of the Brandon Mayfield case (Petition, p. 3, FN6); The 2009 National Academy of Science's Report Strengthening Forensic Science in the United States (Petition, p. 2); and the 2011 Scottish Fingerprint Inquiry Report (Petition, p. 7, FN8). None of these studies were extant at the time of the 1995 trial nor the first Appellate opinion in this case in 2001. This information is, by definition, newly discovered material facts and nothing in Rule 32 or case law requires that a first Petition of right denominate the claim as such.

1.b Pat Wertheim committed perjury in the 1995 trial when he testified he had made identifications of Petitioner's fingerprints from the Tovrea home. (Petition, pp. 16-23) There is no doubt that this testimony from an internationally recognized expert affected the judgement of the jury, requiring reversal of the conviction. *See, Kyles v. Whitley*, 514 U.S. at 103, 96 S.Ct. at 2397. This material fact was discovered for the first time in the early months of 2012 following the publication of the Fingerprint Inquiry in December

2011, of which Mr. Wertheim was a central character. It was not until his methodology in the Shirley Mckie case could be compared to his methodology in the James Harrod case that his perjury in the latter case could be conclusively established. This was, by definition, newly discovered material facts.

Denials of Petitions for Post-Conviction Relief are reviewed on an abuse of discretion standard. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). "A court abuses its discretion if a decision is manifestly unreasonable or is based on untenable grounds or if its discretion is exercised for untenable reasons. *Torres v. North Am. Van Lines*, 135 Ariz. 35, 40, 658 p.2d 835, 840 (1982)". *Schwartz v. Superior Court, Maricopa County, State RPI,* 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (1996). Imposing a condition upon Petitioner contrary to that imposed upon him by the rules is manifestly unreasonable, based on untenable grounds and is an exercise in discretion for untenable reasons.

By employing the artifice that Petitioner "reframed" certain arguments in his Reply, the Court then reaches the astonishing conclusion that Petitioner did not raise the claim at all. The court's reliance on *State v. Lopez*, 223 Ariz. 238, 221 P.3d 1052 (2009) is misplaced. The petitioner in *Lopez* filed a Rule 32 petition which asserted the sole claim that it was error for the trial court to order him to pay $400 in attorney's fees (*Id.* at 239, 1053). "After the State responded to his petition, Lopez filed a reply in which he asserted additional claims of ineffective assistance of trial and appellate counsel." (*Id.*). Quite clearly, these claims were ***absent*** from Lopez's petition and only advanced for the first time in the reply. In the instant Petition these claims are present and fully presented. This does not present the harm which the *Lopez* court sought to protect against:

> "The rule that issues not 'clearly raised' in the opening brief are waived" serves "to avoid surprising the parties by 'deciding their case on an issue they did not present' and to prevent the court from 'deciding cases with no research assistance or analytical input from [both] parties.'" *Meiners v. Indus. Comm'n*, 213 Ariz. 536, n. 2, 145 P.3d 633, 635 n. 2 (App. 2006), *quoting Childress Buick Co. V. O'Connell*, 198 Ariz. 454 ¶ 29, 11 p.3d 413, 418 (App. 200) (alteration added).
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> *Id.* at 240, 1054.

Here, the State was fully on notice of the nature and substance of Petitioner's claims, there was no danger of "surprise". The *Lopez* court distinguished those claims which ". . . attempt simply to further his initial argument" from those which ". . . allege[d] entirely new claims of ineffective assistance of counsel." (*Id.*). Quite clearly, the Petitioner here is simply furthering his initial argument with his reply, something of which the *Lopez* court implicitly approved.

Moreover, the *Lopez* court expressly acknowledged, in its discussion of *State v. Bishop*, 144 Ariz. 521, 698 P.2d 1240 (1985), that the court has the discretion to consider on the merits an argument which was first raised as late in the proceeding as a Supplemental Reply Brief. (*Id.* at 239, 240, 1053, 1054). In short, the *Lopez* opinion uniformly supports Petitioner's position.

It was an abuse of discretion for the trial court both to impose a condition on Petitioner which is contrary to what the rules require, and then maintain that because Petitioner did not comply with this non-existant requirement, his argument vanishes because it is somehow "reframed" in his reply. The abuse of discretion standard applies to Petitions for Post Conviction Relief. *See, State v. Amaya-Ruiz*, 166 Ariz. 152, 180, 800 P.2d 1260 (1990); *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). An abuse of discretion "has been interpreted to apply where reasons given by the court are clearly untenable, legally incorrect, or amount to a denial of justice". *State v. Chapple*, 135 Ariz. 281, 297, 660 P.2d 1208, 1225 (1983) *quoting State ex rel. Fletcher v. District Court of Jefferson County*, 213 Iowa 822, 831, 238 N.W. 290, 294 (1931). It is clearly untenable to maintain that "reframing" an argument in the reply causes the argument in the Petition to disappear, it is legally incorrect to require the Petitioner to comply with a condition contrary to what the rules require and it is a denial of justice to preclude the Petitioner from contesting his conviction when it was obtained by a misrepresentation of scientific evidence and perjury.

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2.A Suggestive Identification Procedures

This claim was summarily dismissed as precluded (MEO p. 4). This claim was made to specifically demonstrate why it was ineffective assistance of Appellate counsel to not include the issue on direct appeal (Petition, pp. 24-32). Additionally, this claim was also expressly incorporated in claim 12(A)(4), IAC in the 1997 trial for failure to offer expert testimony in memory and eyewitness issues to rebut Debra Nolan's putative identification. (Petition, p. 72). Thus, since this argument was in support of two separate ineffective assistance of counsel claims, at both the trial and appellate levels, it was an abuse of discretion to preclude it.

2.B This claim, alleging IAC of Appellate counsel in the first Appeal was addressed on the merits (MEO, p. 9-10). The MEO concedes that only the hypnosis issue and not the suggestive identification issue was raised on appeal (MEO, p. 10). The court surmises, in the absence of any evidence, that its absence was a conscious exercise in "winnowing" the issues for appeal (MEO, p. 9). In raising the hypnosis issue appellate counsel necessarily had to claim that the trial court committed reversible error in permitting Ms. Nolan's identification testimony (Appellate's Opening Brief, p. 28). It would have been an equally simple matter to claim that the trial court erred in finding that identification procedures were not unduly suggestive. There was ample case law in support of such a claim and ample facts on which to make it. *See, State v. Via,* 146 Ariz. 108, 704 P.2d 238 (1985); *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (1997); *Neil v. Biggers*, 409 U.S. 188, 196, 93 S.Ct. 381 (1972) *quoting Simmons v. U.S.*, 390 U.S. 377, 384, 88 S.Ct. 967, 971 (1968).

The identification issue was perhaps second only to the fingerprint evidence in importance to the case. There was sufficient knowledge in the legal community at the time of the first appeal to support the suggestive identification procedures as a viable claim. *See State v. Harrod*, 200 Ariz. 309, 26 P.3d 492 (2001), Justice Feldman's concurrence, 505, 322 and FN1.

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3. Significant Change in the Law

The claim that Petitioner's arguments about the admissibility of the polygraph results were "reframed" as a significant change in the law is simply baffling. The entire Polygraph argument is predicated on the notion that the adoption of the *Daubert* standard constituted a significant change in the law, as repeatedly stated in the Petition. The claim that Petitioner "reframed" any of this is simply unfathomable. (See Petition, pp. 33-36).

Further, this Court, as did the State, mistakenly asserts that the Polygraph issue was not raised until the penalty phase of the 1997 trial. Petitioner sought the admission of his successful polygraph results in the guilt/innocence phase of the 1997 trial, as was made clear in both the Petition and Reply. (See Petitioner, p. 33, Inst. #132).

Additionally, the Court maintains that Petitioner provides no authority for the proposition that the change to *Daubert* constitutes a significant change in the law. To the contrary, Petitioner cited *State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993) in which the Arizona Supreme Court itself made just such a characterization at p. 580.

Lastly, Petitioner notes the Court mislabels this argument as 3.B, rather than 3.A.

4. 403 Argument, Gruesome and Inflammatory Photographs

The Court claims that Petitioner "reframes" this argument without further elaboration. Again, the Court neither defines nor explains what it means by "reframed", nor does it point to any Arizona published authority that such conduct disqualifies a claim. The 403 Argument is set out in the Petition at pp. 36-38. It is referenced again at pages 15 and 16 of the reply, which asserts ineffective assistance of counsel of Appellate counsel for not raising the claim in a due process context. Contrary to the lack of authority for disallowing "reframed" claims, Arizona case law does state that the court has the discretion to consider claims raised for the first time as late as a supplemental reply brief. *See State v. Bishop, supra* at 524, 1243. Arizona has long recognized "a strong preference that cases be resolved on their merits". *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, 181 P.3d 219, 225 (App. 2008). While that case is civil, there is no logical reason, and no prohibition, why such a preference does not apply to a criminal case. Additionally,

Arizona has an equally strong interest in seeing that substantial justice is done. ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. Art. 6 § 27). Here, a supposed technical error is being employed to avoid an examination of whether substantial justice has been, or will be, done.

5.A 1997 Misconduct

1. 1997 Fingerprint testimony

This issue was addressed procedurally and substantively in Argument 1 above. It could not have been presented on direct appeal because of the newly discovered material facts of the 2006 Brandon Mayfield investigation, the 2009 National Academy of Sciences Forensic Sciences Report and the 2011 Fingerprint Inquiry. Because it is based on newly discovered material facts under Rule 32.1(e). It is not precluded.

2. State's core theory regarding motive.

While there were statements and testimony by Glenn Kearney in the 1997 trial from which it could have been inferred that the Tovrea estate was not being depleted (Petition, p. 39) it was not until Ken Reeves testified in 2005 that "the trust specifically provided she couldn't invade the principle for her own benefit." that the issue was directly addressed (R.T. 9-20-05, p. 120) (Petition, p. 40). This was a newly discovered material fact and so is not precluded.

5.B 2005 Misconduct. (Claim 5 was precluded in its entirety (MEO, p. 4)

1. Selective Immunity

This argument is made as an instance of misconduct, but also as an instance of IAC in the 2005 trial for failing to object or raise the issue. (Petition, p. 54). It is also expressly included in the IAC argument in the 1997 trial for failing to call Ed Tovrea, Jr., as a witness (Petition, p. 72) and in the 2005 trial for failing to move for his immunity (Petition, p. 73). This issue invoked an IAC claim and is therefore not precluded.

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5.B2 Violating Double Jeopardy and Law of the Case by Presenting (F)(6) Evidence.

This claim was not "reframed" in any fashion. It is set out in full in the Petition at pages 40-43, together with the companion argument of changing the theory of the case, at page 43, which expressly alleges ineffective assistance of Appellate counsel at page 43, lines 16-17 for failing to raise the change in theory on direct appeal in the context of double jeopardy and law of the case. The words are there in the Petition in black and white, nothing was "reframed" in the Reply. It is a claim of IAC by Appellate counsel which can only be raised in a Rule 32 Petition.

5.B3 Change in theory

This claim was raised as an instance of IAC by Appellate counsel for raising the claim as misconduct by presenting a "false claim" (Appellant's Opening Brief, p. 41) but not in the context of double jeopardy or violation of the law of the case (Petition, p. 43). Appellate counsel mistakenly conceded that the issue was not raised at trial (*Id.*) and failed to argue that the trial court acquitted Petitioner of being the actual shooter in its 1997 Special Verdict (*Id.*). This is an IAC claim, raisable for the fist time under Rule 32 and is therefore not precluded.

5.B4 Misrepresenting the Circumstances of the Offense as Aggravating Circumstances in Violation of §13-703(G).

This argument expressly incorporates the law and arguments of the immediately proceeding subsections 2 and 3 of the Misconduct Argument (Petition, p. 45, ll. 27-28) (Reply, p. 17, ll. 24-26). Argument 3 expressly contains a claim of IAC by Appellate counsel, which this section 4 incorporates in full. This misrepresentation of the circumstances of the offense is a profound misstatement of the law, utterly defeating the narrowing function required of aggravating factors by due process. The argument profoundly debased the most fundamental precepts of capital sentencing and it is well within the court's discretion to have found the claim meritorious even had it not mistakenly believed the argument did not contain an IAC claim.

6. Selective Immunity (This Argument was precluded in its entirely)

This claim is in support of an IAC claim by 2005 trial counsel. (Petition, p. 47 1.6, p. 73 1.3). It was set out separately to demonstrate with specificity why it was IAC to not seek immunity for Hap Tovrea. It is denominated as an IAC claim both in the heading to the claim (Petition, p. 47 1.6) and again in the IAC claim itself (Petition, p. 73 1.3). Seeking immunity for Hap Tovrea was an achievable goal, triggered by the State's granting of selective immunity. The claim is not precluded.

7.A Judicial Bias (This claim was precluded)

This claim set out with specificity why it was IAC of the 2005 trial attorney to not pursue a claim of judicial bias, therefore it was not precluded. (Petition, p. 61). The failure to meet professional standards is easily illustrated by trial counsel's failure to timely file a 10.1 Notice (Petition, pp. 60-61). The Notice was not filed until five months after Petitioner's *pro per* 10.1 Notice was filed (and struck as a hybrid pleading) and until trial counsel had participated in a contested matter, thereby making the Notice untimely *(Id)*. Presumably, trial counsel felt the Notice was meritorious because he filed it. It was lost only by his dilatory conduct.

7.B The IAC claim was addressed on the merits (MEO, pp. 11-14) and denied as meritless. (MEO at p. 14). The MEO cites various rulings by the trial court generally favorable to the Petitioner which would have been clear reversible error to have ruled otherwise and were on relatively minor issues or were post conviction (MEO, pp. 11-12). Petitioner, respectfully disagrees with the court that these rulings abated the *appearance* of partiality. The *Hurles* argument was made by way of illustration. Petitioner never argued that the trial judge took a similar adversarial position in the Special Action filed in this matter. While the Ninth Circuit Court of Appeals depublished its Opinion naming the trial judge herein by name, it did not reverse its Opinion or facts.

Trial counsel filed a Notice of Change of Judge for cause, so necessarily believed it to be meritorious. The Notice was denied due to his dilatory inaction. This falls below prevailing professional standards.

8. Burden Shifting

This claim was summarily denied as precluded. Yet again, Petitioner notes that it was in support of an IAC claim, was set out with specificity to demonstrate why the conduct fell below prevailing standards and is not subject to preclusion. The Court appears to acknowledge this by addressing claim 12.b.3 on the merits (MEO, p. 18). The issue is dispensed with by noting that the jurors were properly instructed and they are presumed to follow their instructions. This presumption is rebuttable (*Ramos v. Lawler*, 625 F.Supp.2d 347, 356 (2009)) and it most certainly was rebutted herein. During *voir dire*, the jury panel was told, again and again, that it was the defendant's burden to show that the mitigation was sufficiently substantial to call for leniency (Petition, pp. 63-65). This was fundamental error, requiring reversal. *See State v. Hunter,* 142 Ariz. 8, 688 P.2d 980 (1984).

9. 751(E) Argument ("must impose death")

This claim was summarily deemed precluded (MEO, p. 4). The issue of the proper scope and role of the jury has been raised as early as Petitioner's Opening Brief on his first appeal (Appellant's Opening Brief, 12-23-99, pp. 49-53). There, he made the claim that *Jones v. Unites States,* 526 U.S. 227, 119 S.Ct. 1215 (1999) required that a jury, not a judge, make the findings that make a defendant eligible for death. This claim was left unresolved by the Arizona Supreme Court, citing the Supremacy clause, *State v. Harrod*, 200 Ariz. 309, 318, 26 P.3d 492, 501 (2001) (*Harrod I*). That Opinion however did take note that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) was filed after the briefing had been completed in *Harrod I (Id).* Thereafter, the now familiar cases, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) and *Blakely v. Washington*, 542 U.S. 216, 124 S.Ct. 2531 (2004) were decided. (See Petition, p. 66). These cases essentially resulted in a significant change in the law. (See Reply, p. 19). As noted elsewhere in this Motion, this Court has the discretion to address claims that are raised as late as a Supplemental Reply Brief. *State v. Bishop*, 144 Ariz. 521, 698 P.2d 1240 (1985). This, coupled with Arizona's "Strong preference that cases be resolved on their merits." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 178, 181 P.3d 219, 225 (2008). Militate

against a finding of preclusion. The 751(E) Argument represents a legitimate interpretation of the continuum of cases cited above and should not be deemed precluded.

10/11. "Follow the Law" Questions Invaded the Province of the Jury.

These claims were deemed precluded without further discussion (MEO, p. 4). This claim was raised in the context of IAC and is therefore not precluded (Petition, p. 73, l. 4). The "follow the law" argument is expressly incorporated in the 2005 IAC claim (Petition, p. 73, ll. 19-20). The Court acknowledges this when it discusses, *albeit* briefly, this aspect of the IAC claim (MEO, p. 18). The Court appears to misapprehend this argument. It does not involve jurors who held strong views for or against the death penalty. Rather it involved jurors who were capable of imposing the death penalty under certain circumstances, therefore there was no predicate to asking the "follow the law" question. The harm is that at least three jurors (Petition, p. 70) voted for death when death was not warranted in their own moral judgment. They became mere conduits for the State's opinion that death was warranted (*Id*). The narrowing requirement was thereby also defeated.

12. Ineffective Assistance of Counsel

A. 1997 Trial

1. Failure to adequately prepare mitigation evidence.

This claim is addressed at page 14 of the MEO. There was inadequate mitigation investigation and presentation at the 1997 trial, something which trial counsel freely admitted (Petition, p. 71). That this error may not be subject to remediation does not mean it was not error. The Court's claim that "Defendant could never be sentenced" because of the taint of the 1997 errors is a bit too narrowly drawn. It appears the court means the defendant could never be sentenced to death because of the taint of the errors. This presumes a life sentence would be unjust and unacceptable. Under the circumstances, it would not be unjust. The ability to develop mitigation has been forever lost because of the 1997 errors. This sentence should be commuted to life.

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12.A2 Failure to adequately *voir dire* and cross examine Pat Wertheim.

This claim is addressed at page 14 of the MEO, finding that Mr. Wertheim's identification testimony was "within the confines of his expertise." (MEO, p. 14). His job in this case was to examine the latent prints for evidence of forgery or fabrication (R.T. 11-06-97, pp. 105-106) (Petition, p. 16). This process does not involve examining the inked exemplar of a known subject. Making an identification does involve comparing the latent print impressions to the inked exemplar of a known subject. Pat Wertheim never had in his possession the inked exemplar of James Harrod's fingerprints. Pat Wertheim never compared the latent print cards to the inked exemplar of James Harrod. Pat Wertheim committed perjury in the 1997 trial and was emboldened to do so by trial counsel's inept *voir dire* (R.T. 11-06-97, pp. 113-114) (Petition, p. 21).

Petitioner never claimed fingerprint comparison and identification was "outside of Mr. Wertheim's expertise" (MEO, p. 15). The claim is that he committed perjury when he testified that he actually had made identifications of the latent print impressions; to do so would have required comparisons of the latent print impressions to the known inked exemplar of James Harrod.

Trial counsel was unable to pursue a misidentification defense because the material facts to do so were unknown in 1997. They are now known and this Petition presented them. Nothing can undo what the jury was told about the mistaken certainty with which the fingerprint evidence was presented in the 1997 trial and it was an abuse of discretion to completely avoid this issue.

12.A3 Failure to call various witnesses in 1997

This claim is addressed at page 15 of the MEO. Calling Jason Hu as a witness was a good idea as far as it went but it was no substitute for calling members of the MECA board. Ed Tovrea Jr. could have been called and immunity obtained for him as set out above in the selective immunity argument. The Security Manager of the Beach Club could have been called, not just for the absence of a sign-in by Gordon Phillips, which the MEO addresses, but also for the fact that security was not called and did not patrol the perimeter

following the Phillips visit, which the MEO does not consider. MECA board member testimony would not have been cumulative, nor inadmissible and would have provided new information, namely, that MECA was a legitimate, functioning business, not just some paper shell set up to disguise payments from Tovrea to Harrod. As pecuniary gain was the sole aggravator proven the value of such witnesses cannot be overstated.

12.A4 Failure to offer eyewitness rebuttal witnesses

This claim is addressed at page 16 of the MEO where the court concludes, in the absence of any evidence, that this was a tactical decision. More likely, the issue was financial: "MR. BERNAYS: My offer of proof would be, that because we were taking the case in on such a shoestring budget . . ." (R.T. 4-29-97, p. 19). Cross examination, however effective, would have been bolstered by expert testimony giving the scientific foundation for why Ms. Luster's eye-witness identification was not credible. Cross examination and expert testimony are not mutually exclusive, as suggested by the MEO.

12.B1 Failure to Secure Use Immunity for Hap Tovrea in 2005

This claim is addressed at page 16 of the MEO. Trial counsel did not seek immunity for Hap Tovrea. Rather, he sought to have the court compel Mr. Tovrea to answer a list of questions he deemed to be not incriminating (Inst. 464) (Petition, p. 48). Predictably, Mr. Tovrea declined to answer the questions, citing his 5th Amendment right. (R.T. 3-22-05, p. 24) (Petition, p. 48). It was at this juncture trial counsel's performance became deficient; he did not seek use immunity for Mr. Tovrea. As set out in the Petition (pp. 47-54), this was an achievable goal due to the selective grants of immunity by the State. It was the refusal of the trial court to order Hap Tovrea to answer the questions which was the assignment of error on Appeal (Appellant's Opening Brief, p. 41). That was the issue the Arizona Supreme Court was addressing in *Harrod III*, not the issue raised herein. What was addressed in *Harrod III* was whether the trial court erred in not requiring Mr. Tovrea to testify *without a grant of use immunity*. That is an entirely different question than that presented by the instant claim. There is nothing in the record that speaks to whether pursuing a grant of use immunity would have been "futile" as claimed by the court (MEO,

p. 17). The issue herein was never presented in 2005; that is the basis of this IAC claim. It was an abuse of discretion to dispense with this claim on grounds not presented by, nor urged in, the claim.

The references in FN4 to *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984) and *State v. Axely,* 132 Ariz. 383, 646 p.2d 268 (1982) are inapposite. As noted in the Reply (p. 21) *Axley* simply deemed *U.S. v. Morrison*, 535 F.2d 223 (3rd Cir. 1976) and *Virgin Islands v. Smith,* 615 F.2d 964 (3rd Cir. 1980) to be inapplicable to it. They were inapplicable because, as in *Fisher*, there had been no grants of immunity to other witnesses. What is worth noting however, is *Fisher* expressly acknowledged the "court's inherent authority to immunize a witness. . ." (*Fisher, supra* at p. 244, 767). The instant case has every prerequisite for such a grant. There had been the use of selective immunity, Hap Tovrea would have offered "clearly exculpatory" and "essential" testimony (*Id.*) and, after 17 years of investigating Hap Tovrea, the State no longer had a strong interest in withholding immunity (*Id*). (Petition, p. 49) (Reply, p. 22). Under the facts of this case, immunity was available for Hap Tovrea and it was ineffective assistance of counsel to not request that the court order it.

12.B2, 12.B4, 12.B5 "Follow the Law" Voir Dire, Failure of Rehabilitation, Inadequate Voir Dire

These issues are addressed at page 17 of the MEO and disposed of in summary fashion. The "follow the law" questions usurped the jury's role thereby defeating the narrowing function required in capital litigation. Three jurors were seated who were misled into abandoning their own moral principles for those of the State (Petition, p. 70). The "follow the law" questions were unwarranted and unauthorized by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968). We know these three jurors voted for death. The improper and unauthorized "follow the law" questions misled these jurors into thinking "that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell v. Mississippi,* 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985). It was fundamental error to ask this question under these circumstances and IAC

to permit it.

12.B3 Burden Shifting

This issue is addressed at page 18 of the MEO and concludes that because the jurors were properly instructed and are presumed to follow their instructions, no error occurred. This presumption is rebuttable. *Ramos v. Lawler,* 625 F.Supp.2d 347, 356 (2009). The jurors were told, over and over by defense counsel no less, that the defendant bore the burden of persuading the jury that the mitigation was sufficiently substantial to call for leniency. (Petition, pp. 63-65). It is inconceivable that the jury instruction cured this barrage of misinformation. Burden shifting is fundamental error requiring reversal. *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984). Day after day of such fundamental misinformation could not possibly been undone by a jury instruction. It was ineffective assistance of counsel for trial counsel to conflate the burdens of proof and persuasion.

12.B6 Mitigation Witnesses Regarding Death Row Disclosures

The court has granted supplemental briefing on this claim.

13. Portillo Argument

In this instance, the Court is correct that Petitioner inadvertently did not expressly reference IAC of Appellate counsel in the Petition, though it was referenced in the Reply. Inasmuch as the argument takes pains to document that the issue was properly preserved for appeal, it was a reasonable inference that the argument was founded on IAC. Given the court's "strong preference that cases be resolved on their merits", the favoring of "substantial justice" contained in Art. 6 §27 of the Arizona Constitution and this Court's inherent discretion, it would be a simple, and fair, matter to find the ineffective assistance of counsel claim was fairly raised by making it express in the Reply.

14. Mitigation Evidence was Improperly Restricted

This claim was summarily precluded (MEO, p. 4). This argument expressly incorporated the *Witherspoon/Blakely* Argument (Petition, p. 79) which was in turn expressly incorporated in 2.B2 a claim of IAC by 2005 trial counsel. Therefore, this claim was not waived or precluded (Reply, p. 26). It operates in support of the

Witherspoon/Blakely "follow the law" IAC claim and is therefore not waived.

15. Actual Innocence

The entire Petition and all of its arguments are in support of the claim of actual innocence and the Petition says exactly that at page 79. The State enumerated five factors which it felt undermined the claim of actual innocence. (Response, pp. 49-50). Petitioner's Reply addresses each of those claims, demonstrating in particular why none of them is as compelling as it might first appear, as was done at greater length in the Petition itself. Replying to specific assertions in the response is the purpose of a reply. It certainly was not "reframing" any argument. Each assertion in the reply was made, typically at much greater length, in the Petition itself. There are no new arguments in the Reply nor any that weren't first made in the Petition. Petitioner could hardly have been expected to republish every argument in the Petition, predicating each one with the words "actual innocence is supported by . . .". By claiming that the Reply somehow "reframes" the argument is simply penalizing Petitioner for filing a Reply at all.

At page 5 the MEO goes on to state that claims 4, 5.b.2, 5.b.4 and 13 are unsupported by Affidavit, but cites no authority that such Affidavits are required. Rule 32.5 does provide that when such Affidavits are supplied, they shall be attached to the Petition but no where states such Affidavits are *required*. By contrast, the very next sentence in Rule 32.5 provides: "Legal and record citations and memoranda of points and authorities are *required*." (Emphasis added). As noted above *inclusio unius est exclusio alterius*. There is no requirement in the Rules that claims be supported by Affidavit.

The balance of page 5 of the MEO addresses the actual innocence claim, noting the high burden to establish such a claim. As an initial matter, for the reasons set forth above, Petitioner disputes that he did not raise the claims in his Petition. In dispensing with the actual innocence claim, footnote 2 took notice that "even the concurrence noted 'the great weight of the evidence in this case and [Defendant's] inability to explain any of the incriminating facts. . .'" About this, two things must be noted: 1) the statement was not an appraisal of the evidence overall, it was only noting the author's willingness to defer to the

trial court's ruling on the polygraph issue, and 2) this inability occurred in 1995 and was commented on in 2001; much has changed since then. This very same concurrence makes extensive observation of how DNA testing has exonerated many persons, even though they had been found guilty beyond a reasonable doubt (200 Ariz. at 505-506 and FN2) and presciently questions "the great weight we have placed on fingerprint evidence." (*Id.*, at FN4). Indeed, this very point was made at great length in the Petition itself, citing the FBI's Brandon Mayfield investigation, the National Academy of Science's Forensic Science Report and Scotland's Fingerprint Inquiry following the Shirley McKie prosecution.

This case is not locked in the amber of 1995 and the developing understanding of the limits of fingerprint evidence needs to be considered in light of what is now known in 2013, not what was believed in 1995.

Based on the foregoing it is respectfully requested that this court reconsider its earlier decision and grant further proceedings on all claims.

RESPECTFULLY SUBMITTED this 9th day of August, 2013

/s/ Richard D. Gierloff
Richard D. Gierloff
Attorney for Defendant

The foregoing efiled and notification sent electronically this 9th day of August, 2013, to:

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